THE

LAW RELATING TO BETTING

TIME-BARGAINS AND GAMING.

BY

G. HERBERT STUTFIELD,

OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW.

6/-

WATERLOW & SONS LIMITED, LONDON WALL, LONDON

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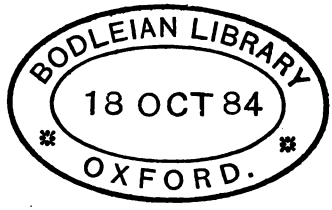

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TO THE

HON. SIR HENRY HAWKINS,

ONE OF THE JUDGES OF

HER MAJESTY'S HIGH COURT OF JUSTICE,

THIS WORK IS,

BY PERMISSION, RESPECTFULLY DEDICATED

BY

THE AUTHOR.

PREFACE.

THE law of gaming has, in all its branches, been the subject of much litigation during the past twelve months. This fact, coupled with the circumstance that there exists no complete or exhaustive treatise on the subject, induced the author to write this small book, in the hopes of supplying what was evidently a real want. A cursory reference to the Table of Contents hereto appended will suffice to show the subject matter and arrangement of the work: and a comparison with the Law Reports of the last two years will show that all the matters herein treated of have of late been the subject of important judicial decisions; it may even be said of leading cases. The cases of *Lynch* v. *Godwin* and *Read* v. *Anderson* prove how little the relations between principal and turf commission agent were understood. In the following pages an attempt has been made to give an exhaustive account of all the cases which constitute the law as to the reciprocal relations of the two.

With respect to Stock Exchange transactions, the history of the litigation from *Grizewood* v. *Blane* down to *Thacker* v. *Hardy* discloses a vast amount of misconception as to the course of business in that market. In more cases than one juries found that the transactions on which they had to decide were in the nature of mere wagers or "bargains for differences." But these findings were always reprobated by the judges as not warranted by the facts. Affidavits of leading Stock Exchange men were from time to time produced, to the effect that transactions of that nature are unknown in their business: witnesses before the Stock

Exchange Commission of 1878 testified to the same fact. How far such corrections of the misconception which existed, have acquired publicity may be difficult to say: but the present work contains a chapter devoted to Stock Exchange transactions (particularly with reference to the cases in which it has been sought to apply the law relating to wager-contracts) where quotations will be found from the above-mentioned sources, which it is hoped may be useful in affording information, which can only be derived from books to which the majority of the public have no access. Special reference is also made to the law relating to the sale of bank shares, which has been brought into special prominence during the last two years by the failure of two great banks, the West of England and the Oriental, which gave rise respectively to the cases of *Neilson* v. *James* and *Barclay* v. *Pearce*. With respect to the other branches of the laws of gaming, it does not seem likely that public interest will be allowed to languish. It was not long since the *Globe* published a paragraph on a bazaar to be held at Birmingham, which is quite of a piece with the observations in the following pages on institutions of that description. The *Evening News* continues to publish accounts of gaming hells in Soho, which shows that the lessons of the Park Club case have been but little laid to heart; while the *Daily Telegraph* was not long ago appealed to by a correspondent to assist in taking the beam out of our neighbour's eye and endeavouring to discourage gambling at Boulogne. A full account is given of the Park Club case in this work; the author must be pardoned for any shortcomings in respect thereof, on the score that, the case not being as yet reported in any of the regular reports, he was compelled to rely on the daily papers.

But, perhaps, on no subject is there a greater need of a clear exposition of the law than on the subject of Betting Houses and Places, &c. The statute declared such houses and places common nuisances, and provided that they should be common "gaming houses" within the meaning of a former statute. What the term "place"

meant had to be learned by experience. It received the broadest possible construction from the Courts. The argument that it was intended to confine the operation of the Act to betting in urban districts received no countenance. A wooden structure, an open enclosure, an umbrella, and finally a stool in the grand stand, were each in succession decided (under the circumstances) to be a "place" within the Act, and—it is impossible not to go a step further—*ergo* a common gaming house within 8 & 9 Vict. c. 109! Moreover, till quite lately it never seems to have been clearly understood what species of betting it is which the Statute prohibits. Thus clubs where members habitually meet for the purpose of betting with one another, have not only been connived at but in one case (*Oldham* v. *Ramsden*) have been decided to be legal. It seemed inconsistent that the law which permitted institutions of this description refused to countenance the operations of the book-maker on his stool. It seems at least fair that the law should be definite and intelligible; and that the persons whose business it is fashionable to decry as *contra bonos mores*, should be enabled to know what they may do, and what they may not. The late case of *Reg.* v. *Cook* has done a great deal towards elucidating the difficulty. An attempt is made in the latter part of this work to give a full and, it is hoped, an accurate account of the exact effect of this case. It will be seen that the distinction suggested is between persons meeting to bet together and a person laying himself out to bet indiscriminately with all comers: it is the latter which the law forbids: the distinction seems on all fours with the distinction between betting houses and clubs where members bet.

Attention is also devoted to the special liability which the law imposes on the keepers of licensed premises for allowing gaming therein, a liability which no doubt may in many cases be irksome and difficult to discharge, but has been thought necessary for the preservation of order in places where order is most difficult to preserve.

The author would add that, in giving what he believes to be an

accurate account of the strict letter of the law in all these cases of criminal liability, he by no means wishes to suggest (and the remark holds good, particularly in the case of gaming houses, betting places, etc.) that it would be advisible to enforce the law in all its strictness in every case. As the law stands according to its letter, a bookmaker may find it difficult to steer clear of infringing the Statute. The observations in this volume are written with no unkindly feeling towards "booky," but rather with a view of enabling him to see exactly how he stands, while in his, as in other cases, much must be left to the discretion and good sense of the tribunal by whom his case is adjudicated.

In conclusion, the author submits his small work to the kindly consideration of "all whom these presents may concern." He is aware that in dealing with numerous interests he is at the same time submitting to the jurisdiction of a varied and extensive tribunal, composed, at least, of the Law, the Stock Exchange, and the Turf. The difficulties of the subject are not inconsiderable, in some cases owing to the lack of authority, in others owing to the number of Statutes bearing on the subject, which sometimes seem to conflict with one another. But whatever may be the shortcomings of this work they do not arise from want of care.

It is scarcely necessary to add that any suggestions as to additions or alterations with respect to the matters herein treated of would be most thankfully received by the author,

G. HERBERT STUTFIELD.

19, OLD SQUARE, LINCOLN'S INN

September, 1884.

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THE LAW OF BETTING.

CHAPTER I.

WAGER-CONTRACTS.

PART I.

At Common Law wager-contracts were neither illegal nor void; technically, they could, like any other legal contract, be enforced by an action at law. The only obstacle in the way of obtaining this remedy was that the Courts, grudging the amount of time consumed in adjudicating upon what were often exceedingly frivolous wagers, when other more important causes were waiting for trial, took upon themselves to postpone all actions of this kind until the rest of the business had been disposed of; or, in the language of Lord Ellenborough in *Gilbert* v. *Sykes*,[1] "until the Courts had nothing better to do." At the same time there were certain kinds of wagers which could not be enforced, as being of a mischievous, immoral tendency, or contrary to the policy of the law. Among such were:— At Common Law.

(1.) A wager which would give either party an interest in interfering with the course of justice—*e.g.*, a wager on the conviction or acquittal of a man charged with forgery.[2] On the other hand, in *Jones* v. *Randall*,[3] it was held that there was nothing illegal in a wager as to the result of an appeal Wagers illegal at Common Law.

[1] 16 East, 150. [2] *Evans* v. *Jones*, 5 M. & W., 77. [3] Cowp., 37.

from the Court of Chancery to the House of Lords, it not being in the power of the parties to influence the judgment of the House.

(2.) Where the ascertainment of the fact or the event would involve inquiries respecting the age or sex of third persons or tend to make him an object of public curiosity. Thus in *Da Costa* v. *Jones*[1] a wager as to the sex of a third party was held to be illegal. In *Ditchburn* v. *Goldsmith*[2] a wager that a certain woman would be delivered of a male child before a certain date was held illegal on the ground that neither party had any interest in the question; and this in spite of the fact that the woman had herself challenged inquiry on the subject.

In *Eltham* v. *Kingsman*[3] two parties were proprietors of certain carriages called "Fly by nights," which they let to hire at Cheltenham; the plaintiff laid a wager that a certain person would go in his "Fly by night" to the assembly room that evening. The Court were inclined to think this would be illegal as tending "to subject a third party to great inconvenience by exposing him to the importunities of the proprietors of these vehicles; any person who has walked through Piccadilly must be sensible that this is no small inconvenience."

Where question concerned parties themselves.

The law, however, was different where the question related to a matter affecting either or both of the parties to the wager.

In *Hussey* v. *Crickett*[4] the plaintiff and defendant were dining one evening with seven other gentlemen at Furnival's Inn Hall. The two entered into a wager of a "Rump and dozen" as to which was the elder. Each appointed one gentleman to name a day on which the registers of baptism should be produced, and to order a dinner for the "Rump and dozen." The two gentlemen named appointed a day and ordered a dinner at the Albion in Aldersgate Street, which was paid for by one of them, but the money was repaid

[1] 2 Cowp., 729.
[2] 4 Camp., 152.
[3] 1 B. & Ald., 683.
[4] 3 Camp. 168.

him by the plaintiff. Plaintiff won the bet, but the defendant refused to attend the dinner. Plaintiff sued to recover the amount he had paid.

While for the defendant it was argued that the wager was of a frivolous, immoral nature, and that at most plaintiff could only recover his share of the entertainment, it was replied for the plaintiff, that the wager relating to the parties themselves was not void as if it related to a stranger; that it was not of an immoral nature, as "it was for the public benefit to promote conviviality and good humour"; that the plaintiff's loss of a share in a good dinner was not a frivolous loss in the eye of the law. Indeed, it appeared from a quotation from the Roman law, that that very universal system of jurisprudence, while discouraging wagers in general, recognised an exception where the terms of the wager bound either party to provide any form of conviviality.

MANSFIELD, C.J., having confessed himself judicially ignorant of the meaning of the term "Rump and dozen," parol evidence was admitted to explain this exceedingly patent ambiguity. The term, as explained by the witnesses, seemed at any rate to bring the case within the Roman law, it being stated to signify "a good dinner and plenty of wine for all present." Upon this state of the facts, the judges, while regretting that they had allowed the action to trouble the Court at all, judicially decided that there was nothing immoral in sitting down to a good dinner! Therefore, adjudging the wager to be valid, the Court, in spite of the fact that defendant had not partaken of the dinner, ordered him to pay for the whole of it. This case is a good illustration of the kind of issues which the Courts had to try, when wagers were enforceable.

(3.) Wagers which would tend to improper discussion, *e.g.*, concerning the amount of any branch of the Revenue.[1]

(4.) Wagers concerning any illegal sport or game, such as a cock-fight,[2] or hazard.[3]

[1] *Atherfold* v. *Beard*, 2 T. R., 610. [2] *Squiers* v. *Waiskin*, 3 Camp., 140. [3] *MacKinnell* v. *Robinson*, 3 M. & W., 435.

(5.) Where one party could determine the event in his own favour,[1] as a wager by an attorney's clerk that he would not pass his examination.

(6.) Wagers were also illegal which gave either party an interest in doing or procuring some unlawful act, as a wager that Napoleon would be assassinated by a certain day,[2] or which might bias a person in the discharge of a public duty, such as a wager between two voters as to the election of a member for a county; but this was not the case where the wager was made between two persons who were not voters for that county.[3]

16 Car. II., c. 7.

The earliest statutory enactment restricting the power of enforcing gaming debts in a Court of Law was 16 Car. II., c. 7. A great improvement had been introduced into the breed of horses by the importation of a number of horses from Tangier, which formed part of Queen Catherine's dowry, and racing under the patronage of Charles II. was fast becoming a national pastime. As a natural consequence the practice of betting increased at a proportionate rate, and to such an extent as to interfere with individuals pursuing their ordinary avocations. The statute, after reciting that all games and exercises should not be used otherwise than as innocent and moderate recreations, and not as a calling or means of livelihood, and that young people wasted their time and fortunes in the immoderate use of the same, enacts:

(1.) That if any person or persons of any degree or quality whatsoever, at any time or times, shall, by any fraud or shift in playing at or with cards, dice tables, tennis, bowles, skittles, shovel-board, or in cock-fighting, horse-races, dog matches, or other pastimes or games whatsoever, or in bearing a share or part in the stakes, wagers, or adventures, or in or by betting on the sides or hands of such as do or shall play, act, ride or run as aforesaid, win, obtain, or acquire to him or themselves, or to any other or others any sum of money or valuable thing, shall forfeit treble the sum or value of the thing won.

[1] *Fisher* v. *Waltham*, 4 Q. B., 889. [2] *Gilbert* v. *Sykes*, 16 East, 150.
[3] 1 T. R., 56.

Sect. 3. Any person who shall play at any game aforesaid, or any other game other than with or for ready money, or shall bet on the sides of them that do play thereat, and shall lose any sum or sums of money, or other thing or things so played for, exceeding the sum of £100 at any one time or meeting, upon ticket, or credit or otherways, and shall not pay down the same at the time when he or they shall lose the same, shall not be compellable to make good the same, but the contract or contracts for the same, and for every part thereof, and all and singular judgments, statutes, recognisances, mortgages, conveyances, occurrences, bonds, bills, specialties, promises, covenants, agreements, and other acts, deeds, and securities whatsoever given for the same shall be void.

It will be observed that this statute aims solely at (1) cheating at play; (2) excessive gaming on credit. It does not make wagering illegal so long as it is unaccompanied by fraud, and the parties are at liberty to wager to any extent provided they pay ready money.

The next statute is 9 Anne, c. 14.

Section 1. All notes, bills, bonds, judgments, mortgages, or other securities or conveyances whatsoever, given, granted, drawn, entered into, or executed by any person or persons whatsoever, where the whole or any part of the consideration of such conveyances or securities shall be for any money, or other valuable thing whatsoever won by gaming or playing at any game whatsoever, or by betting on the players, or for repaying any money lent for the purpose of gaming or betting as aforesaid, or lent or advanced at the time and place of such play to any person playing shall be void to all intents and purposes, and that all property so encumbered shall devolve on such person as would be entitled if the owner were dead. 9 Anne, c. 14.

By section 2 any person, who at any time or sitting, by playing at cards, dice tables, or other game, losing £10, should pay the same, was entitled to recover the same by action of debt, or in default of such person suing any person,

might recover treble the amount for the benefit of the poor of the parish.

Section 5 inflicts penalties on any person winning any sum of money by any fraud, and on any person who should win over £10 from any person or persons at one time or sitting.

It will be observed that this statute carried the restrictions on private betting and gaming considerably further than the Statute of Charles II. It prescribed additional penalties for fraud; it made a great reduction in the test of excessive gaming by substituting £10 for £100 as the maximum sum which a person might lose.[1] Further than this, it made it penal to exceed the limit thus laid down, instead of merely making the money irrecoverable. It has been held that the offence under the statute was complete by the mere fact of winning the moneys whether it were paid over or not.[2]

It should be observed that the statute does not deal with wagering generally, but only with gambling and betting at games, sports, or pastimes. In *Applegarth* v. *Colley*[3] it was decided that the games and pastimes aimed at by both statutes are the same.

Betting at games alone within statute.

Both these points have an important bearing on the law as it exists at the present day, as will be seen when we come to discuss the provisions of 5 & 6 William IV. Before dealing with the latter statute, it will be important to notice a few points which were decided on the effect of the two earlier statutes, otherwise the provisions of the Statute of William IV. will not be intelligible.

Games within the statute.

(1.) As to the games that are within the Statute of Charles II. and of Anne are very general, speaking of "any games whatsoever." At the same time certain games have in particular been expressly decided to be within the Acts.

Horse-racing.

Thus *horse-racing* is specifically mentioned in the Act of Charles II., but not in that of Anne. However in *Blaxton* v. *Pye*[4] and in *Applegarth* v. *Colley*,[5] this species of

[1] By 18 Geo. II., c. 34, the test of excess was extended to the loss of £20 within 24 hours.

[2] *Smith* v. *Bond*, 11 M. & W., 549.

[3] 10 M. & W., 723.

[4] 2 Wils., 349.

[5] 10 M. & W., 723.

pastime was decided to be within the Statute of Anne, the "games" mentioned in which statute were the same as those mentioned in the Statute of Charles II. This subject will be treated more fully when we come to the Statute 8 & 9 Vict., c. 109. For a long time horse-racing was illegal, except under certain conditions[1], but was early in this reign legalised generally by 3 & 4 Vict., c. 35. But although the racing itself was made legal, that did not affect the provisions of the statutes against wagering.

Wagers not legalised by 3 & 4 Vict., c. 35.

Thus in *Bentinck* v. *Connop*[2] a race was to be run for stakes of £50 for each colt, to which the plaintiff and defendant were subscribers, the defendant subscribing for three colts. The plaintiff won the race, but the defendant disputing the result refused to pay his stakes. Plaintiff sued him to recover the amount he should have paid by the agreement. It was admitted that the race itself was not illegal as it did not infringe the Statute of George II.,[1] but *held* that the fact of the race being legal did not make the contract enforceable—that the contract was within the Statute of Charles II., a contract to pay a sum of money exceeding £100 lost at horse-racing, and not paid down at the time; but that it would have been recoverable (? from the stakeholder) if the money had been deposited before the race. To the same effect was the decision in *Shillito* v. *Theed*,[3] that the Statute of George II. had not repealed the provisions of the earlier statutes as to wagering.

Dog matches[4] mentioned in the Statute of Charles II. include coursing matches as well as dog fights.

Cricket[5] is a game within the statute so that a match for £20 was illegal, even though not finished in one day. A bond given to secure payment of a bet on a cricket match was void.

Foot races[6], even though against time. Of course where-

[1] See *post* p. 70.
[2] 5 Q. B., 693.
[3] 7 Bing., 405.
[4] *Daintree* v. *Hutchinson*, 10 M. & W., 85.
[5] *Lynall* v. *Longbottom*, 2 Wils., 36. 1 C. & M., 797.
[6] *Jeffreys* v. *Walter*, 1 Wils., 220.

ever any game is declared illegal of itself no sum of money could be recovered as being won thereat. Thus in *MacKinnell* v. *Robinson*[1] it was held that money lent for the purpose of playing at hazard (which game, together with ace of hearts, pharaoh, and basset, were declared illegal by 12 Geo. II., c. 28) could not be recovered back, and that the statute applied to gaming at private as well as public tables.

Cock-fighting[2] seems to be illegal at Common Law, but no doubt it is a game within the statute which speaks of games generally.

Statute only applies to bet before or at time of race, &c.

It should be noted that the statute only speaks of betting on the sides of them that "do and shall" play.

In *Pugh* v. *Jenkins*[3] it was held that these words did not apply to a wager between parties as to the accuracy of their information as to the results after the race was over.

The statute also left unaffected any wager in a game for a sum not over £10 and paid down at once, *e.g.*, by deposit with a stakeholder[4].

(2.) Another question which arose in these statutes was whether they avoided the contract itself or only the security. In *Robinson* v. *Bland*[5] Lord MANSFIELD distinctly lays it down that the contract might be good but the security void, and in the same case it is pointed out that whereas the Statute of Charles II. expressly avoids the contract, that of Anne deals only with the security, and that probably all reference to the contract in the latter statute was designedly omitted. In *Macalister* v. *Haden*[6] it was held that an action would lie on a wager for a sum under £10 on a race for over £50, races for under that sum being at that time illegal by the Statutes of George II. In *Barjean* v. *Walmsley*[7] money lent for betting purposes was held to be recoverable, as the statute applied to the security only, and not to the contract.

[1] 3 M. & W., 435.
[2] See *Squiers* v. *Waiskin*, 3 Camp., 140.; and *Martin* v. *Hewson*, 10 Exch., 737.
[3] 1 Q. B., 631.
[4] *Emery* v. *Richards*, 14 M. & W., 728.
[5] 2 Burr., 1080.
[6] 2 Camp.
[7] 2 Strange, 1249.

However the Court of Exchequer in the case of *Applegarth* v. *Colley*[1] seem to have inclined to a different view as to the effect of the statutes. It was argued by counsel in this case that the Statute of Anne had avoided the security only, and not the contract, but Baron ROLFE in delivering the judgment of the Court said that the Legislature had by the provisions of the Statute 5 & 6 William IV., c. 41, to which fuller reference will be made hereafter, virtually decided the question. "It is impossible," he says, "to impute to the Legislature an intention so absurd as that the consideration should be good and capable of being enforced until some security is given for the amount, and then by the giving of the security the consideration should become bad.[2]

(3.) The Statute of Anne in making securities "void to all intents and purposes," worked great injustice in the case of innocent holders for value of bills and notes which had originally been given for gaming transactions. Thus in *Shillito* v. *Theed*[3] the defendant had accepted a bill of exchange for £185, drawn on him for the payment of a wager on a legal horse-race. It was argued that as the plaintiff was a *bonâ fide* indorsee of the bill for value, it was not avoided in his hands. TINDAL, C.J., held that as the statute avoided the security to all intents and purposes, not even a *bonâ fide* indorsee for value could sue. It would seem, however, that the statutes did not prevent an indorsee of a bill or note originally accepted or made in payment of a betting debt from suing the indorser on his indorsement, if such indorsement were in consideration of a valid debt. Thus in *Bower* v. *Brampton*[4] the plaintiff sued as indorsee of promissory notes given by defendant to one Church for money knowingly advanced to defendant to game with at dice, and Church indorsed them to the plaintiff for value without notice—*Held* that he could not sue the defendant as maker of the notes, as that would be a means of evading the Act; but that he could sue Church on his indorsement.

Bower v. *Brampton.*

[1] 10 M. & W., 723.
[2] See, too, *Thorpe* v. *Coleman*, 1 C. B., 990.
[3] 7 Bing., 405.
[4] 2 Strange, 1155.

Edwards v. *Dick*.

Again in *Edwards* v. *Dick*[1] the plaintiff sued as indorsee of a bill of exchange drawn by the defendant on the acceptor in payment of a betting debt, but indorsed by the defendant to the plaintiff in payment of a valid debt. *Held*, that although no action would lie against the acceptor either by the drawer, or any one else claiming through him, still the defendant could not set up as against the plaintiff the gaming consideration as between himself and the acceptor.

PART II.

5 & 6 Wm. IV., c. 41. Section 1.—Securities deemed to be given for illegal consideration.

Such was the state of the law when the Statute 5 & 6 William IV., c. 41 was passed, which in effects provide By section 1 that so much of the Statutes of Charles II. and Anne which declared that any note, bill, or mortgage should be absolutely void should be repealed, but that any note, bill, or mortgage which were declared void by such statutes should be deemed to have been made, drawn, accepted, given, or executed for an illegal consideration.

Section 2.—Acceptor can recover from drawer.

By section 2, it is enacted that if the person who gives such note, bill, or mortgage should actually pay to the holder of such security the money secured thereby, such payment shall be taken to have been made for and on account of the person to whom the security was originally given.

It should be noticed that the only alteration in the law made by this statute is that instead of avoiding the securities given for gaming debts altogether, it declares that the consideration for which they are given shall be illegal, or, in other words, it puts such securities on the same footing as those which are given for an illegal consideration; consequently, a few remarks as to the law on the subject of instruments given for illegal consideration may here be advisable.

Law as to illegal consideration.

Bills and notes.

The general rule is that if A accepts a bill drawn upon him by B, or gives him a promissory note, for an illegal consideration, the instrument no doubt is entirely void as between A and B, so that the latter cannot sue the former

[1] 4 B. & Ald., 212.

upon it; still if B transfers the instrument by indorsement or otherwise to C, who takes without notice that it was originally given for an illegal consideration, and gives value for it, C may sue all the prior parties and recover upon it. The chief difference that such illegality makes to C is, that a presumption is raised that C is the agent for the original holder, *i.e.*, that the indorsement to him is presumed to be merely a means of evading the law and enforcing the originally illegal contract.[1] Consequently the rule is that the burden of proof lies on the transferee of showing that he took the instrument *bonâ fide*, *i.e.*, without notice of the illegality, and that he gave value for it. Moreover the illegality would affect the interests of a transferee if at the time of the transfer the bill were overdue. Before the late Bill of Exchange Act, it was commonly said that an indorsee of an overdue bill took it subject to all the equities attaching to the bill. Thus, if a bill were obtained from the acceptor by fraud or undue influence, or given for an illegal consideration, those were equities between the original parties which would prevent the instruments being enforced as between them; but would not affect a *bonâ fide* transferee for value. The fact, however, of a bill being overdue would be sufficient notice of the infirmity to prevent his being a *bonâ fide* holder. The new Bill of Exchange Act[2] leaves the law practically unchanged, excepting in phraseology. For "*bonâ fide* holder" is substituted the expression "holder in due course."

Burden of proof is on transferee.

Overdue bill.

45 & 46 Vict., c. 61.

"Holder in due course."

By section 29, the holder in due course is defined to be (1) a person who takes a bill not overdue and without notice of dishonour, if any; (2) and takes it in good faith and for value, and at the time the bill was negociated to him he had no notice of any defect of title of the person who negociated it.

The expression "defect of title," which occurs in this section, is substituted for the older and more cumbrous one

[1] 5 E. & B., 238. See Lord Campbell's judgment.
[2] 45 & 46 Vict., c. 61.

of "equity attaching, etc." By section 29, the title of a person who negotiates the bill is "defective" when he obtains the bill or acceptance thereof by fraud duress ("force or fear" in Scotland), or other unlawful means, or for an illegal consideration (which includes a gaming debt).

Defect of title shifts burden of proof.

By section 30, the holder is presumed to be a holder in due course until the contrary is proved; but in that event the burden of proving that value has in good faith been given for the bill is shifted on to the holder.

Overdue bill.

By section 36, an overdue bill is negociated subject to all defects of title affecting it.

The result of these enactments, stated in the language of the law at the present day, seems to be shortly as follows:—

(1.) A bill or note accepted or made for a gaming debt (such as is dealt with by the Statute of Anne) is subject to a defect in title.

(2.) If such instrument be overdue, any transfer is made subject to such defect.

(3.) The holder must in all cases, to entitle himself to sue when once the illegality has been proved, show that he took the bill or note *bonâ fide* and for value.

Absence of consideration not a defect,

As will be seen by reference to any work on Bills of Exchange, mere absence of consideration does not constitute a defect of title; consequently the indorsee for value of an overdue accommodation bill can recover on the bill from the acceptor.

Nor is a void consideration.

In *Fitch* v. *Jones*[1] the question was raised as to whether a consideration not illegal but merely void by Act of Parliament constituted an "equity." It was an action on a promissory note by the indorsee against the maker. Defendant pleaded that the note was given by him to one C in payment of a bet on the amount of hop duty in 1854, the bet being made since the passing of 8 & 9 Vict., c. 109. It was not an illegal consideration within 5 & 6 William IV.,

[1] 5 Ex. B., 238.

as the bet was not on a game or pastime. A question was raised at the trial as to whether the plaintiff had given value for the note when endorsed to him. The judge directed the jury that the onus was on the defendant of proving that no value was given. On this ruling the substantial question in the case was raised before the Court, viz., whether the voidness of the consideration had the same effect as illegality, in throwing the burden on to the indorsee (*i.e.*, the plaintiff) of showing that he took the note for value and without notice. The Court held that the consideration was merely void by 8 & 9 Vict., c. 109, and not illegal; and that this had not the effect of raising the presumption that the plaintiff took the note without value.

Questions have sometimes arisen upon what amounts to notice of the illegality, which, as has been seen, a holder of a bill is sometimes called upon to disprove. On this subject reference should be made to works on Bills of Exchange. It seems that there need be no express or precise notice, but that any circumstance of suspicion which ought to have put the holder upon enquiry is sufficient. Thus, in *Soulby* v. *Portarlington*,[1] defendant was acceptor of a bill for £1,000, payable to one Aldridge, who was keeper of a gaming house, for money lost at play. It was endorsed to one Brooke, who discounted it with Soulby & Co., wine merchants, the plaintiffs in the action, with whom Brooke, a retail wine dealer, had dealings. The plaintiffs advanced £700 on the bill, agreeing to deliver £300 in wine. Soulby commenced an action in Ireland on the note. The defendant instituted a suit in the Court of Chancery in England to restrain the plaintiffs from proceeding with the action, on the ground that it was given for a gambling debt. *Held* that the facts were such as to put the plaintiffs on enquiry as to what the origin of the bill was, especially as it was not denied by the plaintiffs in their affidavits that they knew that Aldridge was the keeper of a gambling house. That the Court had clearly jurisdiction to restrain the plaintiffs (who were

What notice is sufficient.

[1] 3 M. & K., 104.

resident in England) from proceeding with their action in Ireland, and also to order the bill to be delivered up to be cancelled.

Hawker v. *Hallewell*, 3 Findley. 3 Sm. & G.

The case of *Hawker* v. *Hallewell*[1] is a good illustration of cases where the transferee will not be held to have taken with notice, and also of cases where the transferor by his conduct estops himself from alleging the illegality of the original consideration.

Assignee of bond.

In *Hawker* v. *Hallewell*[2] the plaintiff gave a bond in 1841 to one Jenkins to secure repayment of a betting debt; at least, this was assumed for the purposes of argument, though the evidence did not prove it. Jenkins assigned the bond and a policy of assurance to a bank. Plaintiff, in June, 1848, made a proposal to the bank that the bond and policy should be given up and that the existing debt, together with a further advance, should be secured by mortgage on some reversionary property of the plaintiff. The plaintiff alleged that he had given notice to the bank that the bond was given for a gaming debt. The plaintiff, in 1853, assigned all his property to trustees for the benefit of his creditors, and now filed a bill to administer the trusts. The Chief Clerk disallowed the claim of the bank. The plaintiff contended that the bond was void under 9 Anne, c. 14, which had not been repealed by 5 & 6 William IV., so far as regards bonds. 8 & 9 Vict., c. 109, which repealed so much of the Statute of Anne as was not repealed by 5 & 6 William IV., was not retrospective. The Vice-Chancellor decided on the facts that the bank had taken the bond without notice of the original consideration. He also held that, although the operative part of the Statute of William IV. only applied to negotiable securities, yet the recitals included bonds and securities of every kind; so that an obligee was within the equity of the statute, and that, on the principle of Equity follows the Law, a *bonâ fide* assignee of a bond for valuable consideration would be treated in the same way as a *bonâ fide* holder of a bill of exchange. But there was a further ground on which his honour decided in favour

[1] *Ubi sup.* [2] Sm. & G., 194.

of the bank—that the plaintiff by his proposal in 1848 had held out to the bank that the bond was a valid security, and that on the principle of *Pickard* v. *Seears*,[1] he could not be heard to set up its invalidity. This latter point seems to be the same as that on which *Edwards* v. *Dick*[2] was decided, viz., the ordinary principle of estoppel—that if one person by his acts or representations induces another person to believe in the existence of a certain state of facts, and acting on such belief to enter into a contract with him, he cannot be heard to say that those facts do not exist.

Estoppel of obligor.

Of course, the burden of proving the illegality of the consideration lies on the person who sets it up, on the principle that he who alleges the affirmative must prove it. This was clearly recognised by the Court in *Fitch* v. *Jones*. By the Rules of Court, 1883, facts showing illegality either by Statute or Common Law, must be specially pleaded.[3] It seems, too, at any rate under the old system of pleading, that it was not sufficient for defendant to plead a fact showing illegality, but he must also aver that plaintiff gave no value for the bill, although the illegality once established would raise a presumption to that effect.[4]

Pleading illegality.

It seems that in order to throw the burden of proof on to the shoulders of an indorsee, it is not sufficient that the illegality should be admitted on the pleadings; it must be proved in evidence. Thus in *Edmunds* v. *Grove*[5] in an action by the indorsee against the maker of a note. *Plea*, that the note was made for a gaming debt, and indorsed to plaintiff without consideration and with notice. To this plaintiff replied denying the notice and absence of consideration without denying the illegality. *Held*, that although the pleadings by not putting in issue the illegality admitted it, still that had not the effect of throwing the burden of proof on to the plaintiff that he took without notice and for good consideration. Presumptions or inferences of fact could only be drawn by

Admission in pleadings not enough to shift burden of proof.

[1] 6 Ad. & E., 474.
[2] B. & Ald., 212.
[3] O.XIX., r. 15.
[4] *Harvey* v. *Towers*, 6 Ex. 656.
[5] 2 M.&W., 641. See, too, *Bingham* v. *Stanley*, 2 Q. B., 117.

the jury from facts proved before them. The issues only, and not the pleadings, were before the jury. The practical importance of this decision would be (provided it be considered good law at the present day) that in spite of any admission on the pleadings, the person who is advising on evidence must see that evidence of the illegality is forthcoming, so as to get the benefit of the presumption.

The exact nature of the consideration should be stated.

It is always advisable, particularly where a plea of illegality is set up, to state fully the circumstances under which the contract or security is affected with illegality. Thus in *Bolton* v. *Coghlan*[1] plaintiff sued as indorsee of a note made by defendant. The latter pleaded that it was made for money lost at play.

The evidence showed that defendant lost money at play to one Aldridge, and accepted a bill for the amount drawn by Aldridge. Aldridge indorsed to Knight. It was then agreed between defendant and Aldridge that defendant should in substitution for the bill give Knight his note of hand for the amount Knight indorsed to plaintiff.

Held that as the plea implied that the note was originally given for a gaming debt, whereas it was really only a substituted agreement, the defendant should not be allowed to take plaintiff by surprise and go into evidence of the subsequent agreement.

But under the Rules of Court the judge at the trial has power to allow amendments in the pleadings upon terms as to costs or otherwise.[2]

Action against indorser.

The statute only affects the liability of the acceptor of a bill or maker of a note given for a gaming debt. It does not prevent the indorsee suing the indorser where the indorsement was, as between them, for a legal consideration: the statute leaves the law, as settled in *Edwards* v. *Dick*,[3] untouched.

Money advanced for gaming purposes.

As the Statute of Anne avoided securities given for the

[1] 1 Bing., N. C.
[2] Order XXVIII., r. 6., Rules of Court, 1883.
[3] 4 B. & Ald., 212.

repayment of money advanced for the purpose of gaming, so such securities are by this statute deemed to be given for an illegal consideration.

As has been pointed out above,[1] the older cases to the effect that the Statute of Anne avoided only the security and not the contract, were practically overruled by *Applegarth* v. *Colley*, which decided that the Statute of William IV. affected the contract as well as the security.

It seems to follow therefore, that money advanced for gaming purposes cannot be recovered, irrespective of any bill or note given for repayment.

Money lent for paying a gaming debt.

In *ex parte Pyke*[2] a question arose as to the right to recover money lent to enable the borrower to pay off a gaming debt. A employed B as his agent to back horses for him, which horses lost. B at A's request paid the bets in the settlement at Tattersall's, taking A's promissory notes for the amount. A became bankrupt and B claimed to prove in the bankruptcy, not upon the notes, but for the money thus advanced. The registrar allowed the proof, and the trustees appealed. The Statutes of Anne and William IV. apply not only to money won by gaming, but to securities given to repay "any money knowingly lent or advanced for such gaming or betting as aforesaid, or lent or advanced at the time and place of such play, to any person or persons so gaming or betting as aforesaid." It was argued for the the trustee that this was a debt for an illegal consideration within the above quoted words, as according to *Applegarth* v. *Colley* the statute applied to the contract, and not only to the security, also that on the authority of *Higginson* v. *Simpson*[3] the whole transaction was in the nature of a wager. The Court held that as the money had been advanced after the bets had been made, it could be recovered; but that it would have been different had it been lent with a view to betting.

Deeds for illegal consideration.

(2.) Another consequence of the consideration being declared illegal is, that although the absence of consideration

[1] *Vid. sup.* p. 9. [2] 8 Ch. Div., 756. [3] 2 C. P. D., 76.

does not affect a deed, an illegal consideration avoids it. It seems, too, from *Hawker* v. *Hallewell*[1]; that a bond is within the equity of the Statute of William IV. For the general authorities on the subject of Bonds and Deeds given for an illegal consideration, the reader should refer to Smith's Leading Cases under *Collins* v. *Blantern*.

(3.) Again, if part of the consideration for which an instrument is given be illegal, the whole is vitiated.

Contracts divisible and indivisible.

But here a distinction must be drawn between contracts that are divisible and those that are indivisible.

Hay v. *Ayling*.

Hay v. *Ayling*[2] is an example of an indivisible contract. In 1848 the defendant owed one A £100 on a bet on a horse-race. A was also indebted to the plaintiff. A by arrangement drew a bill on the defendant for the amount which the defendant accepted and was indorsed by A to plaintiff. The bill was dishonoured and the plaintiff at defendant's request gave him further time, and took from him a renewed acceptance, knowing at that time that the original acceptance was given for a gaming debt. *Held* (1) That the fact of there being an additional consideration for the bill sued upon (*i.e.* the giving of time) would not be an answer to the plea of illegality, as illegality in any part of the consideration is sufficient to avoid the contract. (2) That the plaintiff having notice of the illegality, could not recover as a *bonâ fide* holder. (3) That the bills were avoided not by 8 & 9 Vict. c. 109, s. 18 (which statute, as we shall see hereafter, only avoids wagering contracts without making them illegal), but by 5 & 6 William IV., c. 41. It must at the same time be admitted that this view of the matter was not adopted in *Bubb* v. *Yelverton*[3]. This was a summons in an administration suit to determine the legality of a claim on a bond given by the Marquis of Hastings. Having got into racing difficulties, and being unable to pay his debts, his creditors threatened to bring the matter before the Jockey

Bubb v. *Yelverton*.

[1] 3 Sm. & G., 194. [2] 16 Q. B., 423. [3] L. R., 9 Eq., 471.

Club and have the Marquis posted at Tattersall's as a defaulter. To avoid this the Marquis arranged to secure the payment of certain sums to his creditors by bonds with sureties. Lord ROMILLY decided in favour of the claims, on the ground that the consideration for the bonds was not so much the existence of a betting debt, but the forbearance of the creditors to bring the matter before the Jockey Club. It is, however, submitted that the bonds were void as having been given partially for an illegal consideration, viz., a series of gaming debts. On the other hand, as an instance of a divisible contract, in *Clayton* v. *Dilley*[1] the defendant authorised plaintiff to bet for him at the Epsom races. Plaintiff made two bets of £100 each, which were illegal under the Statute of Anne, and another of £5, which was admitted to be legal; all of them were lost, and paid by the plaintiff, who sued to recover from defendant. The Court held that he could recover the £5, but not the £200. It is obvious the commissions to make the different bets were separable.

Contract divisible. *Clayton* v. *Dilley*.

So in *Lyne* v. *Siesfield*[2] a broker sued his client for money paid to his use, to which defendant pleaded that the money was paid in respect of differences on certain contracts by way of gaming relating to the public funds and railway shares. *Held*, that as the plea was bad in parts, and had been united in one, the whole was bad.

It may here be advisable to give a full account of the well-known case of *Applegarth* v. *Colley*[3], to which some allusion has already been made, but which is specially important, not only as an authority on the construction of the earlier Statutes of Charles II. and Anne, but also showing the extent to which those statutes were incorporated into 5 & 6 William IV., c. 41. The plaintiff was a subscriber to a horse-race for which the stakes were £2 with £15 added; the whole sum subscribed amounted to less than £50. The plaintiff won the race and sued the

Applegarth v. *Colley*.

[1] 4 Taunt, 165. [2] 1 H. & N., 278. See *post* under Barnard's Act.
[3] 10 M. & W., 723.

defendant with whom the money had been deposited to recover the stakes. The defendant pleaded the above facts as a defence, and the plaintiff demurred. The first point raised by the plea was, that as the race was for under £50 it was illegal under the Statutes of George II.'s reign; but as all horse-racing had been held to be legalised by 3 & 4 Vict., c. 5, this plea could not be supported. But it was also argued that the plea disclosed a good defence, on the ground that it was a suit to recover a sum of money over £10 won by horse-racing, and so could not be maintained by virtue of the Statutes of Charles II. and Anne. Against this it was argued that the Statute of Anne only avoided the security given to repay a debt, and not the contract itself. The judgment of the Court, which was delivered by Baron ROLFE, established the following propositions:—

(1.) That however the law may have stood under the earlier statutes with respect to the avoidance of the contract, the Legislature had virtually decided the question by passing the Statute 5 & 6 William IV., c. 41, it being "impossible to impute to the Legislature an intention so absurd as that the consideration should be good and capable of being enforced until some security is given for the amount, and that then the consideration should become bad." That, therefore, since the passing of this statute, all *contracts for the payment of money* won at play must be taken to be avoided.

(2.) That in the present case the stakes having been deposited with a stakeholder before the race, there was no contract for the payment of money lost at play, within the meaning of the Statute of Anne: that statute must be read in conjunction with that of Charles II., and was intended to prevent gaming on credit, and not to interfere with playing for ready money.

(3.) That plaintiff was not precluded from recovering by sections 2 and 5 (according to which the loser of £10 or upwards at any one time or sitting may recover it back, and the winner at any one time or sitting of over £10 is subject to

heavy penalties) on the ground that by a fair construction of the statutes, the penalties inflicted on the "winner" &c., only applied where there was a corresponding "loser" of over £10, and in this case the loss of each person was £2 only. It was, however, the Court added, unnecessary to decide that point, as the plaintiff was at any rate entitled to recover the £15, which had been subscribed by a stranger by way of prize to the winner; and the defendant's plea was bad as having covered too much.

It will be seen that the decision leaves untouched the question as to the right to recover where the stakes amount to £10 each; but it would seem that this question could now only be of importance where a bill or note had been given to the winner for the amount, and the winner sues on that instrument: otherwise any such case would now fall under the Statute 8 & 9 Vict. c. 109 (as to which *see post*).

Thorpe v. *Coleman*.

In *Thorpe* v. *Coleman*[1] an action was brought to recover £10, a wager on the Derby. It was sought, in argument for the plaintiff, to upset the decision in *Applegarth* v. *Colley* that the statute applied to the contract as well as to the security. TINDAL, C.J., in giving judgment, said that as to sums of £10 or upwards the contract was clearly not enforceable, seeing that section 2 of the Act of Anne enabled the loser, who had paid the sum of £10, right to recover it by action. He expressly reserved the question, as to whether the statutes affected bets under £10, that is whether the contracts themselves were void as well as the securities given for payment. But to enable a person to recover what could immediately be recovered back from him would only encourage circuity of action.

It seems, therefore, that the statutes did not apply, provided (1) that the stakes were deposited before the event came off, (2) and that they were not more than £10 each. This view of the matter was adopted in *Emery* v. *Richards*,[2] which was an action to recover a stake of 10s. from a stake-

[1] 1 C. B., 990. [2] 14 M. & W., 728.

holder deposited to abide the event of a wager upon a foot-race. It was held that neither party could revoke the stakeholder's authority, as it was a valid wager. "It was not gaming on ticket, because here the money was parted with, nor is it excessive gaming within the Act," it being for a sum under £10.

It must not be forgotten that under the present state of the law (as will appear hereafter) any wager would be void as an agreement, and the stake could be recovered from the stakeholder by the depositor.[1] But the point of importance under the Statute 5 & 6 William IV., c. 41, is whether a wager when forming the consideration for a bill of exchange would be illegal. The above cases show (to illustrate the application of the law at the present day) that if a sum of £10 or under were paid by cheque to stakeholder to abide the event of a race, and such cheque were indorsed by him to a third party for value, it would not be a cheque for an illegal consideration so as to throw the burden of proof explained above on to the shoulders of the indorsee. To sum up shortly the effect of the statute of William IV.:

(1.) It only applies in the case of wagers on games, including horse-racing.

(2.) It does not apply where the wager is made after the event has come off. *Vid. sup. Pugh* v. *Jenkins.*

(3.) It does not affect a cheque given in payment of a deposit on a wager, or the right of the winner to recover the stakes, where each deposit is not over £10.

(4.) All cheques, notes, &c., given in repayment of any money borrowed for gaming or betting purposes are affected with an illegal consideration, and (*semble*) the statute also affects the mere loan of money for the same purpose.

(5.) The statute does not touch loans to repay debts already lost at gaming.

Test of illegality.

It is sometimes difficult to determine whether a transaction, to some extent mixed up with a wagering transaction, is so inseparable from it as to be within the statute.

[1] As to this see *post* p. 51.

In *Simpson* v. *Bloss*[1] it was laid down that the real test whether a demand connected with an illegal transaction is capable of being enforced at law, was, whether plaintiff requires any aid from the illegal transaction to establish his case. The plaintiff laid an illegal wager with B in which the defendant assumed a part. The plaintiff won. Plaintiff, expecting that B would pay by a certain time, advanced to defendant his share of the winnings to which he was entitled by his agreement with plaintiff. B became insolvent and never paid the bet. *Simpson* v. *Bloss.*

Held that as plaintiff could not establish his case without the aid of the illegal wager, he could not recover.

In *Sharp* v. *Taylor*[2] the Court drew a distinction between enforcing an illegal contract, and enforcing a subsidiary contract arising therefrom. They held that although a partnership might have been formed to carry out an illegal object which the Court would not aid in effecting, yet one partner who has received moneys which have been realised in the illegal business, cannot set up the illegality in answer to a claim by his co-partner for an account. Liability of partners in illegal firm to account.

But this case was subjected to some unfavourable criticism by the late Master of the Rolls in the case of *Sykes* v. *Beadon*.[3] This was a case of a society not registered under the Companies Act which the Master of the Rolls held was illegal as infringing that Act, though his decision on that point was overruled by the Court of Appeal in *Smith* v. *Anderson*.[4]

His lordship also was of opinion that it was illegal as infringing the Lottery Acts. The object of the suit was to have the trusts of the society administered by the Court. But his lordship held that as the society was illegal, it was impossible that its objects could be carried out by the Court. Even supposing a suit were framed for the object of putting an end to the society and dividing the assets, he thought

[1] 7 Taunt, 246, but see *Faikney* v. *Reynons*, 4 Burr, 2069, and *Williams* v. *Trye*, 23 L. Ch., 866.
[2] 2 Phil., 801. [3] 11 Ch. Div., 170. [4] 15 Ch. Div., 247.

it very doubtful whether the reasoning in *Sharp* v. *Taylor* was correct, that because an illegal transaction is closed, that therefore a Court of Equity is to interfere in dividing the proceeds of the illegal transaction.

Partnership in betting transactions.

In *Johnson* v. *Lansley*[1] the plaintiff and A were partners in betting transactions. A received the whole of the winnings and in payment to the plaintiff of his share indorsed to him a bill drawn by A on and accepted by the defendant. The transaction was proved to have taken place since the passing of 8 & 9 Vict., c. 109. Defendant pleaded that the latter statute deprived the plaintiff of any right of action on the bill.

Held that the statute did not make betting illegal. A was liable to plaintiff for his share of the winnings, and there was nothing in the Statute 8 & 9 Vict., c. 109, to relieve him from that liability. Per MAULE, J., the money which was the consideration for the bill was money for which A was bound to account to the plaintiff; the losers could not get it back from A, and it would be very unjust that he should keep the whole.

It does not appear from the report that it was contended in this case that the consideration for the indorsement to the plaintiff was illegal under 5 & 6 William IV., c. 41. However that point was raised and decided in the case of *Beeston* v. *Beeston*.[2] Plaintiff had paid money to defendant to bet with on their joint account, plaintiff to receive a share of the winnings. Defendant won, and gave plaintiff a cheque in payment of his share. The cheque was dishonoured, and plaintiff sued defendant on it. It was urged for the defendant that it was a contract by way of gaming, and that the cheque was given to secure the moneys won thereby, and was therefore a void security, both under 8 & 9 Vict., c. 109, and 5 & 6 William IV., c. 41. The Court held that the plea was bad and the plaintiff was entitled to recover on the ground that the consideration for

[1] 12 C. B., 468.
[2] 1 Ex. Div., 13. A fuller report is in 33 L. T. n.s., 700.

the cheque was entirely distinct from the wagering. *Sharp* v. *Taylor* and *Johnson* v. *Lansley* were cited with approval as showing that one partner cannot set up the illegality of a transaction against a co-partner and thereby retain the whole of the profits arising from that transaction.

It was remarked by POLLOCK, B., that the two statutes quoted only applied to contracts and securities as between the parties to the wager.

As between principal and agent.

The same principle would seem to apply as between principal and agent. In *Tenant* v. *Elliott*,[1] a broker, who had received money on an illegal policy of insurance, was held bound to account to his principal for the amount.

Remedy of person who has given bond or note, &c.

It seems that a person who has given a bond, bill or note to secure payment of a gambling debt, can bring an action in the Chancery Division to have the security delivered up to be cancelled, and also under the old practice could obtain an injunction against suing at law to recover upon it[2]. But since the Judicature Act[3], no proceeding in the High Court can be restrained by injunction, though probably this does not affect an injunction against suing in any other court. In some of the cases referred to, the action restrained was brought in an Irish Court; in such a case probably an injunction would lie even since the Judicature Act. In the case of the acceptor of a bill or maker of a note being being compelled to pay the amount to a *bonâ fide* holder, section 2 of the Act provides that he can recover from the drawer or payee for money "paid for and on account of the person to whom the bill was originally given upon such illegal consideration."

Section 2 of Act.

In *Gilpin* v. *Clutterbuck*[4] the plaintiff had been compelled to pay an indorsee of a bill which he had accepted in payment of a gaming debt; and it was held that he was entitled

[1] 1 B. & P., 3.
[2] *Soulby* v. *Portarlington*, 2 M. & K; *Pearce* v. *Gray*, 2 Y. & C., 322; *Milltown* v. *Stewart*, 3 M. & C., 18; *Fox* v. *Hill*, 2 D. & J., 353.
[3] Sec. 24 (5).
[4] 13 L. T., 71 and 159.

by the statute to sue the original payee in an action of "assumpsit," and was not bound to sue in "debt under the statute."

The bill bore interest on the face of it. *Held* that plaintiff was entitled to recover the interest from the defendant as well as the principal sum. *Secus* if the bill does not on the face of it provide for the payment of interest.

Lynn v. *Bell.*

In *Lynn* v. *Bell*[1] the plaintiff, in payment of certain bets on horse-races, gave to the defendant three cheques on the plaintiff's bankers, payable to bearer; two of these were indorsed by the defendant and by his indorsees to third parties, and a third was indorsed by the defendant alone in payment of a betting debt; all were eventually paid by the plaintiff's bankers. Plaintiff sued the defendant to recover under this section the amount of the three cheques. It was urged for the defendant (1) That the cashing of the cheques by the plaintiff's bankers was not a payment of a bill or note within the statute. (2) That he was entitled to set off the amount of a cheque drawn by one A in his favour, and indorsed by him to the plaintiff in payment of a betting debt, and for which the plaintiff had received cash at A's bankers. *Held* (1) as stated above, that the term "bill" in the statute includes "cheque." (2) That the payment by the plaintiff's bankers of the amount of the cheques drawn by the plaintiff to the holders was in effect a payment by the plaintiff himself. "He pays when his banker pays on his account." "A cheque is a direction to pay so much money of the drawer, actually or assumedly in the possession of the drawee." It would be different if, in payment of a betting debt, the plaintiff had drawn a bill of exchange which was subsequently paid by the acceptor, as "it is not necessary nor usual that there should be money of the drawers in the hands of the drawee of a bill of exchange." The language of this part of the judgment would seem to leave it an open question, if the drawer of the cheque had at the time no assets at the bank;

[1] Ir. Rep. 10, C. L., 487.

or in the case of a bill of exchange being given instead of a cheque, if the acceptor recovered the amount from the drawer, whether this would not amount to a "payment" by the drawer within the section. (3) As to the set-off, the same reasoning was applied. The amount of the cheque was not paid by the defendant or his bankers, but by A's bankers, consequently it could not have been recovered in an action by the defendant under this section, and could not be made the subject of a set-off. As to the instruments that are within the statute in the above case of *Hawker* v. *Caldwell*[1] the Vice-Chancellor seemed clearly of opinion that *bonds* were within the equity of the statute. In the above case of *Lynn* v. *Bell*[2] it was held that "bills" in the statute included "cheques." In the judgment are to be found some instructive observations as to the similarities and differences between cheques and ordinary bills of exchange. In *Parsons* v. *Alexander*[3] the plaintiff sued on a cheque and also on an I O U, both given for a gaming debt; as the cheque was unstamped the plaintiff relied on the I O U. But as an I O U is not an instrument or security for a debt, but only evidence of it, it was treated as void under 8 & 9 Vict., c. 108, and not as illegal under 5 & 6 William IV., c. 41[4].

What instruments are within the statute.

PART III.

SUCH was the state of the law at the commencement of the present reign, until it was attempted to deal with wagers by a broad and general enactment, which, however, left the provisions of the Act of William IV. untouched.

8 & 9 Vict., c. 109.

The Statute 8 & 9 Vict., c. 109, s. 18 provides "that all contracts or agreements, whether by parol or in writing, by

[1] 3 Sm. & G., 194. [2] Ir. Rep. 10 C. L. 487. [3] 5 E. & B., 270.
[4] *Bubb* v. *Yelverton*, L. R. 9, Eq. 471, was the case of a bond, but was decided on another point.

way of gaming or wagering shall be null and void, and no suit shall be brought or maintained[1] in any court of law or equity to recover any sum of money or valuable thing alleged to be won upon any wager or which should have been deposited in the hands of any person to abide the event on which any wager should have been made. Provided that this enactment shall not be deemed to apply to any subscription, contribution, or agreement to subscribe or contribute for or towards any plate, prize, or sum of money to be awarded to the winner or winners of any lawful game, sport or pastime."

Section 15 of the Act repeals the Statute of Charles II., and so much of the Statute of Anne as was not altered by 5 & 6 William IV., c. 41, and so much of 18 George II., c. 34, as related to the Statute of Anne or as rendered any person liable to be indicted and punished for winning or losing at any one time at play or by betting, the sum of £10 or £20 within 24 hours.

General effect of Statute.

It will be observed that this statute includes under one sweeping enactment *all contracts by way of gaming*, and therefore has a much wider application than the previous Statutes of Charles II., Anne and William IV., which, as has been before pointed out, apply only to wagers on games and pastimes. Further, the statute introduces a change in the attitude of the law towards transactions of this description in that they are in no sense declared illegal; and all the penal provisions of the earlier statutes are expressly repealed. It merely makes them void and incapable of legal enforcement, or in the language of LUSH, J., in the case of *Haigh* v. *Town Council of Sheffield*,[2] a wager is made "a thing of a neutral character; not to be encouraged, but not to be absolutely forbidden; it leaves an ordinary betting debt a mere debt of honour, depriving it of legal obligation, but not making it illegal." The wording of the statute

[1] This expression did not apply to an action commenced before the Act was passed. *Vide Moon* v. *Durden*, 2 Ex., 22.
[2] L. R., 10 Q. B., 109.

seems moreover to be framed so as to cover the case which arose in *Pugh* v. *Jenkins*[1] where the parties made a bet on a race which had already been run, but the event was unknown to either, and it was held that the earlier statutes applied only to wagers before or at the time the gaming was going on.

It may be convenient in the present place to consider what is the precise operation of this statute on contracts within 5 & 6 William IV. That statute declared that securities for the payment of bets on games and pastimes (including horse-racing), as well as all contracts for the payment of the same, shall be deemed to be for an illegal consideration; at any rate, that is the effect given to the statute by *Applegarth* v. *Colley*. It might well be questioned whether 8 & 9 Vict. c. 109, s. 18, leaves that statute unaffected (in which case all such contracts would still be illegal), or whether the wording of the Act is not sufficiently wide to embrace such contracts and make them merely void like other wagers, that is, in the language of Sir MONTAGUE SMITH in *Trimble* v. *Hill*,[2] to "abolish the distinction between legal and illegal wagers." Of course the latter construction leaves the seeming anomaly of a contract being merely void when standing by itself, but illegal when forming the consideration for a bill of exchange or other security. It is, however, submitted that this is the true view of the matter. There is good reason for declaring such a consideration for a bill of exchange illegal, because there are certain well-known rules of law relating to bills of exchange given for illegal consideration, rules based on convenience, and designed for the protection of innocent holders; and it was, no doubt, thought advisable to put bills given for betting debts on the same footing. It is a strong argument in favour of this view that in nearly all the cases of actions in respect of betting transactions (where the bet was on a horse-race or other game) it seems to have been

? Combined effect of 5 & 6 Wm. IV. and 8 & 9 Vict.

[1] 1 Q. B., *vid. sup.* p. 8. [2] 5 App. Ca. p. 344.

almost assumed that such gaming is only void under 8 & 9 Vict., c. 109: at the same time with the single exception of *ex parte Pyke*[1] the point does not seem to have been raised; but in that case it was argued that the effect of the Statute 5 & 6 William IV. was, as interpreted by *Applegarth* v. *Colley*,[2] to make bets on games, &c., illegal. The point, however, was not decided, as the Court held that the facts did not bring the case within the statute. There is at any rate no question that wager-contracts are avoided only, and not rendered illegal by virtue of 8 & 9 Vict. c. 109. It is not necessary to refer to every case which recognises that fact. The following are perhaps the cases which best illustrate the difference in the effects of illegal and void contracts.—*Inchball* v. *Cotterill*,[3] where a broker sued for work and labour done and money paid at defendant's request, in and about the purchases and sales of shares in a Railway Company. *Held*, that even supposing the "money paid" could not be recovered, there was no answer to the count for work done: and as there was nothing illegal about paying money on gaming transactions (as there was under Barnard's Act), the rest of the consideration was not tainted. In *Thacker* v. *Hardy*[4] and *Read* v. *Anderson*,[5] the agent was held entitled to indemnity from his principal in respect of gaming transactions entered into on his behalf, which he clearly would not be entitled to recover in respect of illegal contracts. So in *Fitch* v. *Jones*,[6] where a bill was given for a betting debt not illegal within 5 & 6 William IV., it was held that a merely void consideration did not throw the onus on to the indorsee's shoulders of proving that he was a *bonâ fide* holder for value.

Wagers void, not illegal by 8 & 9 Vict.

Indian Law.

It may be advisable here to notice that the Indian Contract Act contains provisions of a very similar character. By Art. 30, "all agreements by way of wager

[1] 8 Ch. D., 756.
[2] 10 M. & W., 723.
[3] 4 Jur. n.s., 693.
[4] 4 Q. B. D., 685.
[5] 10 Q. B. D., 100.
[6] E. & B., 238. *Vid. sup.*, p. 10. as to the law relating to bills given for an illegal consideration.

are void; and no suit shall be brought to recover anything alleged to be won on any wager or entrusted to any person to abide the result of any game or other uncertain event.

"This section shall not be deemed to render unlawful a subscription or contribution or agreement for any subscription or contribution for any plate, prize, or sums of money of the value of 500 rupees or upwards, to be awarded to the winner of any horse-race."

It is evident that nearly all the cases decided on the English Statute will apply to these provisions of the Indian Act.

The questions which have arisen as to the construction and effect of the Statute 8 & 9 Vict., c. 109, s. 18, may perhaps be grouped under the three following main headings.

I.—What are contracts by way of gaming within the statute.

II.—The effect of the declaration that "no action shall be brought," &c.

III.—The proviso in favour of a subscription or contribution to a prize.

I.—Under this heading the following topics are of importance. I.—Contracts by way of gaming.

(1) There must be a *consensus ad idem* by both sides to the agreement, and that *consensus* must relate to an agreement which of itself constitutes a wager. It is not sufficient that one of the parties should have it in his mind to speculate or gamble, terms which are used metaphorically and are inclined to be misleading: it is essential that the other party should be privy to and assist in the intent to wager. It is of great importance to bear this in mind in dealings on the Stock Exchange, where a purchaser may simply buy for the purpose of selling again, receiving the difference in price in case of a rise. The vendor is probably entirely ignorant of the purchaser's ultimate intentions. If this is so the contract cannot be in the nature of a wager, *Consensus ad idem.*

as is clearly laid down in *Marten* v. *Gibbons*[1] and *Thacker* v. *Hardy*.[2]

One must win, the other must lose.

(2.) It is essential to a wager-contract that "one party should win and another should lose upon a future uncertain event. . . . Some transactions, however, on which the parties may win or lose upon a future uncertain event, are not within 8 & 9 Vict., c. 109; for instance, the sale of next year's apple crop, in which the parties may be losers or winners, but the essential element of a wager-contract is wanting."[3]

Substance rather than form of contract important.

(3.) In the next place a rule may, perhaps, be stated as follows, that it is not the form, but the substance, of the contract that is important. Thus in *Hill* v. *Fox*[4] the loser of several bets borrowed £2,000 from one of his creditors, and paid him the bets out of the money. The lender sued to recover the money lent. The Court held that if at the time of the advance there was an "agreement or stipulation" that the bets should be repaid out of the £2,000, then the transaction was merely a colourable evasion for obtaining a security for a betting debt; but that if the borrower were at liberty to do as he pleased with the money, even though the lender hoped that he would be repaid out of the money, then it would be a *bonâ fide* loan, which could be recovered. So in *Rourke* v. *Short*,[5] the plaintiff was about to sell some rags to the defendant, when a dispute arose about the price of a former lot of rags; the plaintiff asserting them to have been of one price, and the defendant said they were sold for more.

Wagers under guise of sales.

They agreed to refer the dispute to M, a wine and spirit merchant, and that whichever party was wrong should pay M for a gallon of brandy, and that if the plaintiff was right the price of the present lot should be 6s. per cwt., but if the defendant was right the price was to be 3s. M decided that the plaintiff was right. Plaintiff tendered the rags to the

[1] 33 L. T. n. s., 561.

[2] 4 Q. B. D., 685. The cases bearing on this point are more fully discussed in the next chapter on Stock Exchange Transactions.

[3] Per COTTON, L. J., in *Thacker* v. *Hardy*.

[4] 4 H. & N., 359.

[5] 5 E. & B., 904.

defendant, but he refused to accept them at 6s., but offered 5s. The plaintiff sued to recover the higher price, and defendant pleaded that it was a wager within the statute. The Court held that the plea was good, as the contract was, both in form and substance, nothing but a wager ; it was not like a case of determining the price by the mere ascertainment of the former price. It was not the value of the goods that was to be determined, but the correctness of the parties' opinions. In the course of argument, *Grizewood* v. *Blaine*[1] was quoted. In that case it was held that a contract nominally for the sale of shares, but in reality an agreement for the payment of differences was a wager. But in the present case Lord CAMPBELL observed that the contract was in form a wager, and that it lay on the plaintiff to show that it was in substance something else.

With this case should be compared *Crofton* v. *Colgan.*[2] There the agreement was that the plaintiff should take the defendant's mare in exchange for his own ; and that defendant should give plaintiff half the winnings of her first two races, or in case she should be sold before then, defendant should pay plaintiff one-third of what she should be sold for. *Held* that this was not a wager, but only a means of assessing the price of the mare in certain events.

Brogden v. *Marriott*, 3 Bing., N.C.

On the other hand, in *Brogden* v. *Marriott*,[3] the agreement was for the purchase of a horse for £200, if he trotted 18 miles within an hour, and for a shilling if he failed. The Court held that this was simply a wager on a trotting match against time, and so void under the Statute of Anne.

Agreement with a tipster for a share of winnings.

In *Higginson* v. *Simpson*[4] the plaintiff was what is known as a "tipster," or a person who supplied other persons with information as to likely winners of races, and had supplied defendant with the name of a horse called Begal for the Grand National, and it was agreed between them that the plaintiff should have £2 on Begal, at 25 to 1 against that horse for that race, *i.e.*, that if the defendant backed Begal

[1] 11 C. B., 526. [2] 10 Ir. Rep. Com. L., 133. [3] 3 Bing., N. C. 88.
[4] 2 C. P. D., 76.

and the horse won the plaintiff was to have £50, but if it lost plaintiff was to pay defendant £2. Defendant backed Begal, and it won; and plaintiff sued to recover £50. The Court held that it was necessary to look not only at the form of the contract, but also at the substance; that even if one element in the contract was the remuneration of the plaintiff for his personal skill, yet "the ultimate effect of the bargain was to be wholly dependent upon the occurring of an event over which neither party had any control." But see Appendix.

Stakes deposited on horse-races, games, etc.

(4.) There appears to be no difference between competing in horse-races or games for stakes deposited by the competitors, and betting on the competitors; both are equally agreements by way of wagering. Thus until the passing of the Statute 3 & 4 Vict. c. 35, horse-racing was subject to certain penal restrictions. Even after it had been legalised generally by that statute, it was held in *Bentinck* v. *Connop*[1] that the only effect of the statute was to exempt it from the penal provisions of earlier statutes; it did not make wagers on horse-races recoverable: consequently where two or more persons agreed upon a horse-race for certain stakes (not deposited), it was held that such an agreement was a wager and nothing more; so that the winner could not recover the stakes from the loser. So in the more modern case of *Diggle* v. *Higgs*[2] the Court construed an agreement between two persons for a walking match for £200 a side as a wager. We shall have occasion to revert to this case again when we come to treat of the difference between a wager and a contribution to a prize.

Distinction between "stakes" and "sum added."

An important distinction was drawn in the case of *Applegarth* v. *Colley*[3], between stakes contributed by the competitors (which were then irrecoverable under certain circumstances), and a "sum added" by a third party as part of the prize to the winner. The latter it was held could be recovered by the winner. A race for a prize given by a third party seems to lack one of the elements of a wager

[1] 5 Q. B., 693. [2] 10 M. & W., 723. [3] 2 Ex. Div. 422.

suggested above, viz., that "one must win and the other must lose;" for while one party might be said to win the prize the other can not be said to lose it.

If then, as it is submitted, an agreement for an ordinary horse-race for stakes deposited or subscribed by the competitors themselves is in strict law a mere wager, it must be borne in mind that the law as to depositors and stakeholders, the determination of the authority of the latter, &c., is applicable to such cases. A full account of the cases on this subject is given *post* p. 48 *et seq.*

It must be remembered moreover that since the passing of 8 & 9 Vict., c. 109, s. 18, which avoids "all contracts by way of wagering," the distinctions drawn in *Applegarth* v. *Colley* with regard to prepayment and the amount of the stakes will no longer hold good.

Rescission by wager.

(5.) Sometimes a valid contract is attempted to be rescinded by a wager, *e.g.*, if A is indebted to B in a certain sum, and they agree to toss for "double or quits." It seems clear that this being simply a wager, would not be valid, and that A's original liability would remain.

In *Wilson* v. *Coleman*[1] plaintiff had contracted to take a lease of defendant's house, having paid a deposit of £25. Defendant offered plaintiff £50 to rescind the agreement, which plaintiff refused. The parties then tossed, whether the contract should be rescinded for £50 or £75. The defendant won, and plaintiff sued to recover £50. The Court interpreted the agreement as an absolute rescission for £50, with £25 more if plaintiff won the toss. The two bargains were therefore separate, and the first part of the agreement was not vitiated by the second part being a wager. Otherwise the whole rescission would have been void.

Speculative sales.

(6.) Speculative sales, that is, of goods or merchandize not in the possession of the vendor at the time of the contract, are neither illegal at Common Law, nor are they wagers within the statute. But in the early part of this century a doctrine was propounded that they were illegal. Thus in *Bryan* v.

[1] 36 L. T., n.s., 702.

Lewis[1] the plaintiff sued a broker for negligence in carrying out instructions for the sale of nutmegs. It appeared that the plaintiff was not the owner of the nutmegs at the time, but intended to go into the market and buy. ABBOTT, C.J., who had previously, in *Lorymer* v. *Smith*,[2] said that such contracts were not to be encouraged, now laid it down that no action could be maintained on a contract to sell goods which he has not in possession at the time, but which he simply intends to go and purchase in the market, adding that "the law was not new." The ground of this opinion seems to have been, that such contracts amounted to a wager on the price, and had a tendency to make prices unsteady; at any rate, this was the line of argument adopted in *Hibblethwaite* v. *M'Morine*,[3] in 1839, when the same point came before the Court of Exchequer; but the Court unanimously overruled *Bryan* v. *Lewis*. There was an offence at Common Law, known as "Engrossing," which meant buying up large quantities of goods with intent to sell them again, which seems to hinge upon the same principle as the speculative sales denounced by ABBOTT, C.J. But the law in this respect, which had long been a dead letter, was repealed by a statute, 7 & 8 Vict., c. 24.

Engrossing.

The selling of public stocks, not in the possession of the vendor, was made an offence by BARNARD's Act, but this was repealed by 23 & 24 Vict., c. 28. It was decided by LINDLEY, J., in *Thacker* v. *Hardy*,[4] that there was nothing contrary to public policy, as was contended, in making large purchases on the Stock Exchange by way of speculation, *i.e.*, for the purpose of re-selling at an advanced price. It is fortunate that already too elastic phrase "contrary to public policy," was not allowed to stretch to so unreasonable a length, as it is difficult precisely to estimate what the result would have been to the business world if such a contention had prevailed.

The law as now settled in England has been incorporated

[1] Ry. & M., 386.
[2] 1 B. & C., 1.
[3] 5 M. & W., 462.
[4] 4 Q. B. D. at p. 688.

into the Indian Contract Act, Art. 88, of which provides that "a contract for the sale of goods to be delivered at a future day is binding though the goods are not in the possession of the vendor at the time of the contract, and though he has not at the time any expectation of acquiring them otherwise than by purchase."

Contracts between principal and agent not wagers.

(7.) Questions frequently occur as to the rights as between principal and agent when the latter has been employed by the former to make a wager for him. We have then to consider—

(*a.*) The rights of the principal against the agent.

(*b.*) The rights of the agent against the principal.

The general result appears to be, that the contract between the principal and the agent, by which the latter undertakes to carry out wagering transactions on behalf of the former, does not itself partake of the nature of a wager.

Rights of principal against agent.

(*a.*) It seems that if an agent employed to bet for a principal receive money in respect of winnings he is liable to account to his principal for it. Even if betting transactions were illegal the cases quoted above[1] show that after the event the agent cannot set up illegality against his principal. But apart from that, the obligation of the agent arises not by virtue of a contract by way of wagering, but out of an implied contract to pay over money received to his principal's use; it is in fact a new and independent contract. There is, it is true, a decision of STUART, V.C., to a contrary effect. In *Beyer* v. *Adams*[2] the loser of a bet paid the money into the hands of the plaintiff's betting agent, who had negociated the bet for him. The agent died and the plaintiff sought to prove against his estate in respect of the sum the agent had received. His honour held that the claim could not be sustained. "The language of the statute was perfectly general as to the persons against whom an action was not to lie; and did not solely apply to actions against the loser of a wager.

[1] *Vid.* p. 24. See *Tenant* v. *Elliott*, 1 B. & P., 3; and *Johnson* v. *Lansley*, 12 C. B., 468. *Beeston* v. *Beeston*, 1 Ex. Div., 13.

[2] 26 L. J. Ch., 841.

The cases quoted in support of the claim only decided that the receipt of money by the agent was a good consideration for a bill of exchange, as in *Johnson* v. *Lanzley*. Those cases like *Tenant* v. *Elliott* which showed that an agent could not set up illegality against his principal only dealt with general principles, and not with the words of an express Act of Parliament." It is no doubt a perfectly true distinction between that case and the earlier ones, and that the latter turned on the question of sufficiency of consideration for a bill of exchange, and the same was the case in *Beeston* v. *Beeston*, where AMPHLETT, B., expressly reserves the question "Whether the defendant could keep the money in his pocket if he won?"

There are, however, two cases in which the point has been directly decided contrary to the opinion of the Vice-Chancellor.

Ex parte King.

In *ex parte King*[1] the bankrupt was secretary of a club formed to train and run matches with greyhounds for prizes, and had collected the subscriptions of members. The petitioner was the treasurer of the club and sought to prove in the bankruptcy for the amount of the subscriptions. On appeal it was held that the debt was independent of the gaming and that the treasurer was entitled to prove.

Savage v. *Madden.*

Again in *Savage* v. *Madden*,[2] where plaintiff sued defendant for money had and received to the use of the plaintiff, defendant pleaded that the money was due to plaintiff on wagers upon a horse-race. Baron MARTIN said, "If I were called upon to give a judgment on this plea, I should be disposed to say it was bad, as it does not allege that the money was won by the plaintiff *from the defendant himself*. I think the common form of an account stated would be all satisfied by the money claimed by the plaintiff having come into the hands of the defendant, a third person for the purpose of his paying it over to the plaintiff."

It is quite clear that his lordship considers the obligation of an agent who has received money won on a wager on

[1] M. & A., 676. [2] 36 L. J. Exch., 178.

behalf of his principal, to pay over what he has received is in no way a wagering transaction in itself, though it may arise out of such. This seems in accordance with the view of Baron POLLOCK in *Beeston* v. *Beeston*, that the statutes only apply to contracts as between the parties to the wager.

Must be some privity between parties.

Of course the plaintiff must show privity between himself and defendant. Thus in *Jones* v. *Carter*[1] defendant was treasurer of a Derby lottery. The names of the horses were written on tickets which were issued to subscribers. A bought a ticket in his own name and sold it to plaintiff. The horse named thereon won, and plaintiff sued to recover the money from defendant. *Held*, that there was no privity between plaintiff and defendant. The only privity was between defendant and assignor. It was at best the transfer of a chose in action, which did not authorise the transferee to sue.

Rights of agent against principal.

(*b.*) The next class of cases in which the application of the statute has come into question, is where an agent has been employed to enter into wager-contracts on behalf of a principal; the bets are lost; the agent pays, and seeks to recover from the principal.

Upon this matter two distinct questions have arisen.

I. Whether an authority to bet implies an authority to pay the bet if lost.

II. Granted such implied authority, can the principal revoke the authority to pay, after the event has been determined, and before payment has been made.

Does authority to bet imply authority to pay?

I. Upon this question none of the older authorities go very close to the mark. Thus in *Oulds* v. *Harrison*[2] the defendant employed one Bennett to bet for him, and Bennett laid the bets in his own name on the defendant's account. The bets were lost and Bennett without further authority from defendant paid them, and drew a bill on defendant for the amounts, which was accepted by the defendant, and indorsed by Bennett to the plaintiff. Plaintiff sued defendant on the bill. For the defendant it was argued that the pay-

[1] 8 Q. B., 134. [2] 10 Ex., 572.

ment of the bets by Bennett was in his own wrong and not authorised by his agency. But the Court held that defendant by accepting the bill acknowledged that the payments had been made on his account, and that consequently there was a sufficient consideration for the bill. It must be observed that this case did not decide the point, viz., whether an authority to bet included an authority to pay the bets if lost; from a remark of PARKE'S, B., (at p. 577) "the defendant was not bound in law to repay the drawer," it would seem that in his view it did not. *Jessop* v. *Lutwyche*[1] turned on a pleading point: the plaintiff, a broker, sued to recover differences paid by him on the sale of certain stocks and shares on behalf of the plaintiff. Defendant simply pleaded the Statute 8 & 9 Vict., c. 109, and it was held that the plea was bad, as being consistent with the plaintiff's having paid the money at defendant's *express* request. The plea in *Knight* v. *Chambers*[2] was overruled on the same grounds.

The case of *Rosewarne* v. *Billing*[3] carried the point no further. This was another action by a broker to recover differences paid for his principal. The defendant pleaded the statute without traversing the averment that the money was paid at defendant's request. The Court, following the former cases, held the plea bad; but ERLE, C.J., in giving judgment, expressed his opinion that an authority to bet implied an authority to pay if the bets are lost; and *semble* that if a broker be compellable by the usage of the stock market to pay losses himself, the principal could not rescind the authority to pay. The older case of *Clayton* v. *Dilley*[4] was decided in the Statute of Anne. The plaintiff, the defendant's betting agent, sought to recover money he had paid for the defendant without express authority to do so. The bets were admittedly illegal by statute. It was held that plaintiff could not recover on the ground that there being no express direction to pay, it could not be implied in

[1] 10 Ex., 614.
[2] 15 C. B., 562.
[3] 15 C. B. n.s., 316.
[4] 4 Taunt, 165.

an illegal transaction. This case would therefore seem to have little importance at the present day, betting transactions being void and not illegal. The case of *ex parte Godfrey*[1] seems to be the earliest direct decision on the point, where it was held by BACON, V.C., that money paid by a broker on gaming transactions entered into by him for a principal, was a debt for which a bankruptcy petition might be presented, as the principal knew that the broker was liable under the rules of the Stock Exchange to pay losses, a request to pay on behalf of the principal must be implied. From this decision it would seem that this authority to pay would not be implied unless the principal knew of the liability which the agent was incurring. In *Bubb* v. *Yelverton*[2] (which is reported very shortly) Lord ROMILLY laid down in general terms that an authority to bet implied authority to pay; but in that case (in which Lord Charles Ker claimed payment out of the Marquis of Hastings' estate for money paid on lost bets, he having been the Marquis' agent to bet for him) there could have been no question as to knowledge on the part of the Marquis of the consequences that would result from the agent's not paying.

The case of *Thacker* v. *Hardy*[3] does not afford much assistance on the present point as to the authority to pay being implied from authority to bet, as according to the view taken of the facts by LINDLEY, L.J., which view was supported by the Court of Appeal, the transaction does not seem to have been in the nature of a wager. The case, however, being an action by an agent for indemnity against his principal, the knowledge of the latter as to the course of business the agent would have to pursue, is made one of the grounds of his liability to his agent.

In *Oldham* v. *Ramsbotham*[4] the question was slightly touched upon in argument, but not noticed in the judgment.

In *Lynch* v. *Godwin*[5] plaintiff at defendant's instructions

[1] W. N. C., 1870, p. 95. [2] 21 L. T. n.s., 822. [3] 4 Q. B. D., 685.
[4] 44 L. J. C. P., 309. [5] 26 Sol. Jour. 509.

and in his presence laid £40 on a horse called Vril for the Ascot Stakes. The horse lost and plaintiff paid the bet. The Court of Appeal held that he could recover the money he had paid from the defendant. Per JESSEL, M.R., "If you employ an agent to bet for you, *you know* that he must pay or be subject to unpleasant consequences. *If you do not withdraw your request*, it must continue; and if he pays, he pays at your request." LINDLEY, L.J., also added a more general proposition that an authority to pay was implied in an authority to bet. It is clear that the agent in this case laid the bet in his own name.

From these remarks of the MASTER OF THE ROLLS it would seem (1) That the implied authority of the agent to pay depends on the knowledge of the principal that the agent was himself liable legally or otherwise, which knowledge would probably be presumed in cases of betting through regular betting agents, or as in *ex parte Godefroi*[1] in Stock Exchange transactions; as in both such cases it is well known that the agent is bound by usage to incur personal responsibility. (2) That the principal might withdraw this implied authority to pay any time before the agent had paid the money over to the winner, and so prevent the agent's paying on his account.

Is authority to pay revocable?

II. The general rule of law is that where an agent is invested with an authority coupled with an interest, that is where the authority is given to the donee of such authority for a good consideration for the purpose of securing to him some benefit, such authority is irrevocable.[2] Now it has of late been a much vexed question whether the express or implied authority of a betting agent to pay a bet if lost, where the agent has made the bet in his own name, can be revoked by the principal, or, in other words, whether such authority is so coupled with an interest as to be irrevocable.

Not long ago the very point came before the Courts, in *Read* v. *Anderson*,[3] and this was the first occasion on which

[1] W. N. C., 1870, p. 95
[2] See per WILDE, C.J., in *Smart* v. *Sandars*, 5 C. B., 895.
[3] 10 Q. B. D., 100.

it underwent serious discussion. There were a few dicta on on the subject—that by ERLE, C.J., in *Rosewarne* v. *Billing*,[1] and again the point was mooted in *Marten* v. *Gibbons*.[2] In this case the defendant had, through the plaintiff, a stock broker, sold a future dividend on railway stock to a firm of jobbers. The dividend was eventually declared at a higher rate than that at which the defendant had sold it. Defendant being called upon to pay the difference refused, and revoked the authority of the plaintiff to pay. Plaintiff paid and sued to recover from defendant. Sales of future dividends were not enforceable by the rules of the Stock Exchange. Defendant contended that the authority of the plaintiff to pay had been revoked, but BLACKBURN, J., in giving judgment said: "If the contract was binding on the plaintiff it was impossible for the defendant to revoke it. If not enforceable and not revoked they would be liable. If not enforceable and revoked, I am inclined to agree that they would still be liable." But in this case the plaintiffs had, as brokers, entered into a contract which, although not enforceable against them by expulsion according to the rules of the Stock Exchange, left them, in the opinion of the Court, under a legal liability to the jobbers. In a wagering transaction the case is different, as the agent is under no legal liability.

On the other side the dictum of the MASTER OF THE ROLLS in *Lynch* v. *Godwin* seems to imply that the authority in a betting transaction can be revoked.

Read v. *Anderson*.

In *Read* v. *Anderson*[3] the following were the material facts of the case.

The plaintiff was a turf commission agent, and a member of Tattersall's subscription rooms. The defendant had been in the habit of employing plaintiff to bet for him, paying losses to him and receiving winnings from him. By a well-established usage *known to defendant*, such commission agent employed to back horses does so in his own name, and becomes responsible for payment if the bet is lost to him. The defendant by telegram instructed the plaintiff

[1] 15 C. B. n.s., 316. [2] 33 L. T. n.s., 561. [3] 10 Q. B. D., 100.

to back certain horses for him, which plaintiff did in his own name. The race was fixed for 2 o'clock, and at 3·5 plaintiff handed in at the office a telegram announcing that the horses had lost. Defendant the same evening repudiated the bets, and all liability under them, on the ground that the plaintiff ought to have informed him that he was "on" before the race was run. On the settling day plaintiff paid the bets in question to the winners; had he not done so he would have been liable as a defaulter under Rule 3 of Tattersall's subscription room to be excluded from it, and also under Rule 50 of the Jockey Club would, on being reported by such committee as a defaulter, have been subject to various disqualifications under Rule 49 of the rules of racing as to entering and running horses. It does not appear from the report of the case that the defendant knew of the specific consequences that would ensue from the plaintiff's making default in payment of the bets. On behalf of the defendant it was contended (1) That the plaintiff's authority to bet was subject to an express condition that plaintiff should before the race inform defendant that he was "on." (2) That anyhow such condition was implied by universal usage. (3) That the bets were wagering-contracts that the plaintiff had no authority to pay them, or that if he had such authority was revoked. The judgment of HAWKINS, J., proceeded on the following grounds: (1) He found as a fact that there was no such condition, either express or implied, as that contended for by defendant; also that the bets had *bonâ fide* been made in accordance with the authority. (2) That wagering-contracts being only void, and not illegal by 8 & 9 Vict., c. 109, the loser of the bet might lawfully either pay himself, or request somebody else to pay for him. (3) That such request might be express or implied, and he found *as a fact* that defendant, in giving authority to make the bets, also gave authority to pay them if lost. (4) Found, *as a fact*, that defendant had not revoked this implied authority to pay. (5) Irrespective of the latter finding such authority was irrecoverable as

being an authority which plaintiff had an interest in carrying out; as otherwise he would have incurred serious penalties as a defaulter. (6) That the plaintiff's case might also be put on the following ground: That if one man employs another to do a legal act, which, in the ordinary course of things, will involve the agent in obligations pecuniary or otherwise, a contract on the part of the employer to indemnify his agent is implied by law . . . . and it signifies nothing that such obligation is not enforceable in a Court of Justice. (7) His lordship distinctly reserved the question as to how far these incidents would apply where the agent bets, not in his own name, but in that of his principal.

The case has lately been decided by the Court of Appeal.[1] BOWEN and FRY, L.JJ., affirming the decision of HAWKINS, J., BRETT, M.R., dissenting. The grounds upon which the MASTER OF THE ROLLS bases his judgment are that, although an authority might imply an authority to pay, yet, as betting contracts were void, and as the only inconvenience to the agent consists in his being barred from pursuing a calling to which the law wholly objects, no promise could be implied that such authority should not be revoked. His lordship considered that as a matter of fact defendant had revoked plaintiff's authority to pay; thus differing on that point from HAWKINS, J. BOWEN, L.J., treats the whole question as an inference of fact. In his lordship's opinion, the only inference of fact proper to be drawn was that if the agent carried out his contract, and involved himself in a difficulty, from which he could only escape by paying money, the defendant was to indemnify the plaintiff; further that the plaintiff had paid the bets by virtue of a contract between himself and his principal, that the latter should not revoke the original contract.

His lordship therefore treats the matter somewhat differently from HAWKINS, J., for it will be observed that in the Court below, HAWKINS, J., treats the implied authority to

[1] 49 L. T. n s., 102. It is not yet reported in the other reports.

pay as an inference of fact; which was no doubt amply justified by the previous dealings between the parties, while he deals with the question of revocation of authority as a matter of law.

However, perhaps the result of the authorities may be shortly expressed in the following way—(1) Authority to pay is implied in authority to bet, (*a*) where the agent lays the bet in his own name, (*b*) and where to the knowledge of the defendant non-payment of the bet would entail serious inconvenience to the agent.

(2) That under such circumstances the authority to pay is irrevocable directly the bet has been made.

But it would seem that the cases do not expressly decide how the law would stand in two cases. (1) Where the agent lays the bet, not in his own name, but in that of his principal, thus incurring no personal responsibility. (2) In cases where the principal instructs an agent who is not a professional betting man or not (at any rate to the knowledge of the principal) in any other way connected with the turf so as to incur such penalties for default as the plaintiff in *Read* v. *Anderson* would have incurred. Would the risk of mere social obloquy give the agent such an interest in paying the bet, as to make the authority to pay irrevocable? or supposing the agent belonged to a club, a fact which was unknown to the principal, by the rules of which the committee were empowered to expel any of its members who failed to discharge debts of honour. It will be observed that in nearly all the cases alluded to above that the principal's knowledge, actual or implied, of the agent's responsibility, was the ground of inferring an authority to pay from the authority bet. Of course this question of revocation only arises after the bet has been made, when the responsibility of the agent has attached. There is no doubt as remarked by HAWKINS, J., in *Read* v. *Anderson*, that the agent's authority might have been revoked before the bet was made.

Agent's authority revocable before bet made.

A question, however, may some day arise, as to whether an agent could recover from his principal in the event of

? Where agent has paid by cheque.

his having paid the lost bets by means of a cheque. There can be no doubt that this would be a cheque "deemed to have been given for an illegal consideration" within 5 & 6 William IV., c. 41. Now it is clear both on principle and from the remarks of LINDLEY J. in *Thucker* v. *Hardy*, and of HAWKINS J. in *Read* v. *Anderson*, that an implied promise by a principal to indemnify an agent would not arise in the case of an illegal contract. Does then the fact of a cheque having been given by the agent (who has to act as the principal in the transaction) convert the wager into an illegal contract? It is submitted it would not; that the statute, especially in conjunction with section 18 of 8 & 9 Vict., c. 109, in effect, only makes the wager illegal as forming the consideration for the security, and not for all purposes—not so as to taint all the transactions connected with, or arising out, of it.

II. The next class of cases to consider are those which deal with the interpretation of that part of section 18 of the Act in question, which provides that "no action shall be brought or maintained in any Court of Law or Equity, for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made."

No action shall be brought, etc.

Nearly all the questions which have arisen on this part of the section relate to the right of a party to a wager to recover his stakes from a stakeholder with whom both parties have deposited their stakes. Such questions are of course entirely distinct from the right of the winner to recover the whole stakes from the stakeholder, as they usually occur when one party desires to repudiate the wager and brings his action before the stakeholder has paid over the money to the winner.

Right to recover from stakeholder.

Before the Statute 8 & 9 Vict., c. 109, some wagers were legal, some illegal. With respect to illegal wagers it seems never to have been questioned, but that one party could at any time before the money was paid over to the winner

Cases before the statute illegal wagers.

revoke the authority of the stakeholder, and demand back his stakes. All the cases recognise the distinction between recovering stakes from a stakeholder and recovering on the wager itself[1]. And in *Hastelow* v. *Jackson* it seems to have been considered that where one of the parties to the wager considering himself to be the winner demanded the whole of the stakes from the stakeholder, whereas the other party had really been decided to be the winner, such demand was a sufficient revocation of the stakeholder's authority to pay his stake over to the winner. But this decision was doubted in *Mearing* v. *Hellings*[2].

Legal wagers.

But with respect to wagers which were legal the decisions were not uniform. Thus in *Eltham* v. *Kingsman*[3] it was held that where two parties to a wager had deposited two watches to abide the event of a wager, which was for the purposes of the case assumed to be a legal wager, either of the parties could, while the contract was executory, revoke the authority of the stakeholder and recover his watch in trover. The Court compared the authority of a stakeholder to that of an arbitrator which was clearly countermandable before he had given his decision. On the other hand in the later case of *Emery* v. *Richards*[4], where the plaintiff sued a stakeholder to recover his deposit on a legal foot-race (the sum deposited being under £10). *Held* that as the contract was not illegal under the Statutes of Charles II. and Anne, neither party could retract without the consent of the other.

Statute only applies to actions by winner.

All such questions as to the right to recover a deposit from a stakeholder have since the passing of the Statute 8 and 9 Vict., c. 109, turned out on the construction of the words "no action shall be brought, etc." There is a long series of decisions to the effect that this provision only applies to actions brought by the winner of a wager either against a

[1] *Hastelow* v. *Jackson*, 8 B. & C., 225; *Aubert* v. *Walsh*, 3 Taunt, 277; *Smith* v. *Bickmore*, 4 Taunt, 474; *Howson* v. *Hancock*, 8 T. R., 575; *Robinson* v. *Mearns*, 6 D. & R., 26; *Bate* v. *Cartwright*, 7 Price, 540.

[2] 14 M. & W. See, too, *Hodson* v. *Terrill*, 1 Cr. & M., 797.

[3] 1 B. & Ald., 683.

[4] 14 M. & W., 728. See, too, *Maryat* v. *Broderick*, 2 M. & W. 369, where Parke B. doubts the right of one depositor in a legal horse-race to recover his stake.

stakeholder or against the loser to recover his winnings, and does not prevent either party from revoking the authority of the stakeholder before the money is paid over to the winner, and suing to recover his stakes.

In *Varney* v. *Hickman*[1], plaintiff and one Isaacs agreed to bet £20 on a race to be run between their respective horses, the stakes being deposited with defendant. Before the race the plaintiff declined the bet and demanded back his deposit. On behalf of defendant it was contended that it was an action within the meaning of the section. MAULE, J., in giving judgment, discussed the effect of the part of the section. "The first part of the section," he says, "declares the contract to be null and void; the second prevents the winner from bringing an action to recover the amount of the bet from the loser; the third prevents the winner from suing the stakeholder. It certainly is true that the second branch is involved in the first, *i.e.*: if the section had stopped at the end of the first branch it would have followed that no action could be brought to enforce a contract so declared to be void. But I apprehend there is nothing unusual in an Act of Parliament stating a legal consequence in this way. Then the third branch of the clause, it is said, will be idle and insensible unless there be given to it the further effect of prohibiting the parties from recovering their deposits from the stakeholder upon the repudiation of the illegal contract. . . . . But, I think, if the second branch of the clause be looked at, it is more consistent with the whole to treat the third as an exposition only of the first. . . . . Although perhaps the third clause might have been omitted as well as the second, yet, the second being inserted, the third became necessary also. Looking therefore at the whole section, critically and grammatically, I am of opinion that it does not apply to an action like this, where a party seeks to recover *his deposit* from a stakeholder, upon a repudiation of the wager. Upon higher grounds also, I think that is the true construction of the Act. This cannot be considered as

[1] 5 C. B., 271.

an action brought for recovering a sum of money alleged to won upon a wager; nor do I think it is an action brought to recover a sum deposited in the hands of the defendant to *abide* the event of a wager. As soon as the defendant received notice from the plaintiff that he declined to abide by the wager, the money ceased to be money deposited in the hands of the former to abide the event, and became money of the plaintiff in his hands without any good reason for detaining it."

In *Martin* v. *Hewson*,[1] where money had been deposited to abide the event of a cock-fight, it was held that the words "no action shall be brought," &c., did not apply where the original object of the deposit has been revoked by the depositor; and that (assuming cock-fighting to be illegal) either depositor could *before the event* revoke the stakeholder's authority and recover his stake.

Notice necessary to determine stakeholder's authority.

In *Gatty* v. *Field*[2] it was held that it was necessary to serve the stakeholder with a notice to determine his agency before bringing the action; this would seem to follow from the remarks of MAULE, J., in *Varney* v. *Hickman*, that the effect of the notice was to change the character of the deposit. So in *Savage* v. *Madder*,[3] to which allusion has been made above on another point; to an action for money had and received the defendant pleaded (*inter al.*): "That the money was deposited in the hands of the defendant to abide the event on which the wager was made and is claimed by the plaintiff as the winner of the said wager, and the plaintiff did not repudiate the said wager or demand back his said money *before the event of the said wager*." The Court were unanimously of opinion that this was a good plea; but from the form the plea assumed the case cannot be said to decide that one depositor can revoke the stakeholder's authority; indeed an observation of MARTIN, B. (at p. 180), would seem to imply that section 18 prohibited all actions against the stakeholder at all. It only shows that, at any rate where the wager has not been repudiated, the money retains its

[1] 10 Exch., 737. [2] 9 Q. B., 431. [3] 36 L. J. Exch., 178.

character of money deposited to abide the event. The plea, moreover, seems framed upon the assumption that the revocation must take place before the event and not merely before the money is paid over, as was also suggested in *Martin* v. *Hewson*.

Relation of stakeholder to depositors.

The great difficulty in these cases seems to have arisen from the want of a proper understanding of the real relation in which a stakeholder stands to persons who deposit money in his hands. This question was much discussed in *Hampden* v. *Walsh*.[1] Plaintiff and Walsh deposited £500 each with defendant, as stakeholder, on an agreement that if Walsh should by a certain date prove to the satisfaction of the defendant the truth of some scientific proposition, Walsh should receive the two sums deposited. Defendant decided in Walsh's favour. Plaintiff objected to the decision, and before the money was paid over to Walsh demanded repayment of his deposit from defendant. In spite of this notice defendant paid the whole to Walsh. COCKBURN, C.J., in delivering judgment, alludes to this particular point, which had evidently been dealt with in argument: "We cannot concur in what is said in 'Chitty on Contracts,' 8th edition, p. 574, that 'a stakeholder is the agent of both parties, or rather their trustee.' It may be true that he is the trustee of both parties in a certain sense, so that, if the event comes off and the authority to pay over the money by the depositor be not revoked, he may be bound to pay it over. But primarily he is the agent of the depositor, and can deal with the money deposited so long as his authority subsists. We should look upon the defendant merely as the agent of the plaintiff and as no longer justified in paying over the money when once his authority had been countermanded." The Court held plaintiff entitled to recover, and the case seems to go one step further than previous cases on the statute in showing that the stakeholder's authority may be countermanded after, as well as before, the event has come off, as in *Hastelow* v. *Jackson*.[2]

[1] 1 Q. B. D., 189. [2] 8 B. & C., 225.

The same view seems to have been taken of the matter by the Irish Courts.[1]

These decisions afterwards were supported, first by the Court of Exchequer Chambers, and next by the Privy Council. In *Diggle* v. *Higgs*,[2] plaintiff and A agreed to walk a match for £200 a side, that sum to be deposited by each with defendant. A was declared winner; but before the money was paid over plaintiff gave notice to defendant not to pay to A. Defendant disregarded the notice and plaintiff sued to recover his stakes. The Court were unanimous in upholding the authority of the previous decisions; COCKBURN, C.J., however, who had in *Hampden* v. *Walsh* hinted a doubt as to the correctness of the authorities, here expressly intimates, that if the matter were *res integra*, he would have thought that the words of the statute precluded an action to recover even a deposit; but that he was unwilling to disturb the law as settled.

BRAMWELL, L.J., touching on the meaning of the words "no action shall be brought," thinks that they are wholly superfluous and might have been left out. It will be remembered that MAULE, J., in *Varney* v. *Hickman*, looked upon them as a statement of a legal consequence, not strictly necessary, but intended by way of explanation of the results of the general enactment. It seems, however, not improbable that the words were inserted to prevent any question arising as to the right of the winner to recover from the stakeholder on a count for money received to his use,—a point which would have presented more difficulty than an action by the winner against the loser, and which might have been made a means of evading the Act, by doing through the interposition of a stakeholder what could not be done directly. It being thought advisable to provide for the one case, the other more obvious provision would be inserted for the sake of completeness.

It will be unnecessary to refer to *Trimble* v. *Hill*,[3] further

[1] *Graham* v. *Thompson*, Ir. R. 2 C. L., 64.
[2] 2 Ex. Div., 422.
[3] 5 App. Ca., 342. See also *MacElwaine* v. *Mercer*, 9 Ir. Rep. C. L., 17.

than to say that the same point was decided in the same way.[1]

It seems, therefore, to be clearly settled law, subject only to reversal by the House of Lords, that a stakeholder holds each stake as agent for the depositor and that his authority may be determined in the same way as that of an ordinary agent—

Determination of stakeholder's authority.

(1.) By express notice of revocation, as in all the cases quoted above.

(2.) Where the objects for which the deposit was made have, to the knowledge of the stakeholder, become impossible of performance. Thus in *Carr* v. *Mattinson*,[2] where stakes had been deposited with defendant to abide the event of a horse-race between the plaintiff and one C, the race to be decided by a person named as judge, C on the day appointed did not appear and A's horse walked over the course, and was decided by the judge to be the winner. Plaintiff demanded the whole of the stakes from the defendant, which defendant refused to pay except with the consent of C.

Held, that as soon as the race became impossible to the knowledge of defendant, he held the stake *eo instant'i* as money had and received to the use of the defendant, the defendant's authority to pay the winner being thereby revoked; and that although plaintiff demanded the whole of the stakes as winner, yet that was a sufficient demand of his own stake, which defendant ought to have handed over. Per Lord CAMPBELL, C.J., a demand was unnecessary in this case at all.

Death of principal.

(3.) Probably by the death of one of the depositors. That is the general rule in ordinary transactions between principal and agent, that the authority of the agent is revoked by the principal's death. This point occurred, but was not taken in *Manning* v. *Purcell*.[3] Testator had deposited with two stakeholders a sum of money to abide the result of bets made by himself. It appeared from the

[1] The reader should refer to the observations at p. 31, where the view is expressed that the law relating to wagers applies to an ordinary horse-race for stakes. The result of this would be that the present observations as to the rights of depositors and stakeholders apply also.

[2] 28 L. J. Q. B., 126. [3] 7 D. M. & G., 55.

evidence that a bet is always "off" on the death of one of the parties. On testator's death the stakeholders repaid the deposit to his administratrix. One question raised in the case was whether this deposit passed under a gift in the will of all testator's "money." The Court held that it did not, as although, according to *Varney* v. *Hickman*, testator had power to revoke the stakeholders' authority, he had not in his lifetime exercised this right: therefore the deposit was in no sense his moneys, though since his death it had become part of his assets. The point was not taken that the principal's death of itself revoked the stakeholders' authority, though that result seems to have been arrived at by means of the custom among betting men. But, as Lord Justice BRUCE seems to imply, that if testator had before his death given notice to the stakeholders to return the deposit, it might then have been considered his money, it is not easy to see why the same result should not follow from a revocation by operation of law.

Bankruptcy.

(4.) As a general rule the authority of an agent (*i.e.*, a bare authority not coupled with an interest) is revoked by the bankruptcy[1] of the principal. Although there seems to be no express decision on the point, it seems probable that the same rule would apply in the case of a stakeholder where either of the depositors became bankrupt before the money was paid over to the winner. As the stakeholder is, according to *Hampden* v. *Walsh*,[2] merely the agent for each depositor, the safest plan for him to adopt on receiving notice of a depositor's bankruptcy would be to consider his authority as to that stake revoked, and repay it to the trustee in bankruptcy; or perhaps he would be safe in paying it to the bankrupt himself, if the trustee had not intervened to claim it.

Forfeit or penalty for non-performance of wager not enforceable.

It follows that, as a wager itself cannot be enforced, no action will lie to enforce a penalty for non-performance of a wager.[3] The plaintiff on one side and the defendants on

[1] See *Markwick* v. *Hardingham*, 15 Ch. Div., 339.
[2] 1 Q. B. D., 197.
[3] *Irwin* v. *Osborne*, 5 Ir. Rep. C. L., 404.

the other agreed each to nominate a mare for a race, the party or parties nominating the winner to receive from the parties or party nominating the other mare the sum of £100; the party or parties who should make default in nominating a mare to pay a forfeit to the other side of £100. Defendants failed to cause their mare to run and plaintiff sued to recover £100 as penalty.

Held, that it could not be recovered, as the agreement was a mere wager. "If the agreement be legal there is no obstacle to prevent the recovery of the penalty for non-performance, but if illegal the penalty can no more be recovered than damages for non-performance."[1]

Money deposited with a book-maker.

It would seem that where money has been deposited with one of the parties to a wager it cannot be recovered on a repudiation of the wager.

Thus in *Manning* v. *Purcell* persons who had laid wagers with the testator had deposited with him the sums they had staked. Some of these bets were lost to the testator, and his executrix paid the winners the amounts they had deposited and the amounts of their winnings. It was held that the executrix was not justified in paying either of these sums out of the estate, as they could not have been recovered from testator in his lifetime.

It appears from this that if A goes to a bookmaker (dealing with him as a principal, and not as an agent), and backs a horse at 5 to 1, depositing the £1 with the bookmaker at the time, A cannot afterwards repudiate the wager and recover the £1 from A as he could if it had been deposited with a stakeholder. But it must be admitted that the point was scarcely argued.

Executors must not pay betting debts.

The case is also important as showing that, as a betting debt cannot be legally recovered, an executor is not justified in paying such a debt of his testator's and is guilty of a *devastavit* if he does.

Money deposited, &c., contrary to 16 & 17 Vict.,

If it could have been proved in this case that the testator had kept a house "for the purpose of betting with persons re-

[1] See too *Daintree* v. *Hutchinson*, 10 M. & W. 85, on this point.

c. 119, can be recovered by section 5.

sorting thereto," contrary to the Statute 16 & 17 Vict., c. 119, any money deposited with him on a bet could have been recovered from him or his executor by virtue of section 5, which provides that such deposits shall be deemed to be money paid for the use of the person making the same.

Foreign Law.

The insertion of the clause commencing with the words, "no action shall be brought," may, perhaps, have a practical significance in one case, where an action is brought in England on a wager-contract made in a foreign country where such contracts are enforceable.

It will be sufficient for present purposes to state a few general rules which prevail in a case of what is called a conflict of laws:—

(1) Where a contract contemplates any particular country as the place of performance, the contract is governed by the law of that country, the *lex loci solutionis; e.g.*, the liability of the acceptor and indorser of a bill of exchange, drawn and accepted in France, but accepted payable in England, must be decided according to the law of England.[1]

Robinson v. *Bland*[2] is an example of a bill accepted for gaming debts contracted abroad. Plaintiff sued on an acceptance given in France, payable in England, for money lost at play in France. The acceptor died before action brought. It appeared that the debt could only have been enforced in France by the marshals in a court of honour and not in the ordinary courts, and the only process ultimately available was personal attachment, which in the present case would have been impossible as the debtor was dead. So as the debt could not have been enforced in France, no action would lie here. According to English law the bill was void by the Statute of Anne.

(2.) Where no special place of performance is named, the *lex loci contractus* prevails, that is, the law of the place where the contract is made; or in the case of an executed contract,

[1] See *Rouquette* v. *Overmann*, L. R., 10 Q. B., 525. For further details and authorities reference may be made to "Story's Conflict of Laws," or "Foote's International Jurisprudence."

[2] 2 Burr, 1077. See too *Wynne* v. *Callander*, 1 Russ., 293.

where the transaction is carried out; *e.g.*, money advanced in France for the purposes of gaming is a transaction governed by French law.[1]

In *Quarrier* v. *Colston*,[2] a bill was filed by the personal representative of a deceased person to have an I O U given to defendant by deceased delivered up to be cancelled, on the ground that it was given in respect of money won from deceased at cards, or lent to him for gaming purposes, while travelling on the Continent at Baden-Baden and other places in Germany. Judgment was given for the defendants, on the ground that it did not appear that the games were unlawful by the laws of the country where the money was won.

(3.) The formalities necessary for a contract must be decided by the law of the place where the contract is made.

(4.) Questions of procedure are decided according to the law of the forum where the case is tried.

In *Leroux* v. *Brown*,[3] it was decided the words in the 4th section of the Statute of Frauds, which provide that "no action shall be brought" upon certain contracts therein specified unless there be some memorandum of them in writing, refer to procedure only, and do not affect the substance of the contract; consequently, where an action was brought in England on a verbal contract entered into in France, where no writing was required, but which by the 4th section of the Statute of Frauds ought to have been in writing in England, it was held that as the Statute of Frauds referred to procedure only, the law of England must prevail where the action was brought, and that the rule above-stated as to the formalities did not apply.

? Effect words in 8 & 9 Vict., c. 109.

It may be, therefore, that the same words used in 8 & 9 Vict., c. 109, section 18, would have the same effect, viz., in preventing an action being brought in English Courts on a wager-contract entered into abroad in a country where they are legally enforceable. This, of course, would not apply to

[1] See *King* v. *Kemp*, 8 L. T. n.s., 255.
[2] 1 Phil., 147.
[3] 12 C. B., 801.

money lent for gaming purposes,[1] which depends on 5 & 6 William IV. and not on 8 & 9 Vict., c. 109.

The "proviso."

III. We now come to the last part of the section, commonly called the "Proviso," which says that "this enactment shall not be deemed to apply to any subscription or contribution, or agreement to subscribe or contribute for or towards any plate, prize, or sum of money to be awarded to the winner or winners of any lawful game, sport, pastime, or exercise."

There are three series of questions on this proviso.

I. As to what is "a subscription or contribution to a prize"?

II. As to when a person is "the winner" within the statute?

III. What are lawful games, sports, &c.?

Subscription or contribution.

I. What is the meaning of a subscription or contribution to a prize?

In many of the cases the line is very fine between such subscription and a deposit of sweepstakes. In *Batty* v. *Marriott*,[2] a foot-race was agreed upon between plaintiff and A for £10 a side, and each deposited £10 with the defendant as stakeholder. A was declared winner, but plaintiff disputed the decision and demanded back his stakes. The Court held that the provisions of 16 Car. II. and 9 Anne relating to the question, were repealed by 8 & 9 Vict., c. 109; and that although the contract was in the nature of a wager, still the Act laid down no rule with respect to the number of subscribers necessary to form "a subscription to a prize." It made no difference between the case of two or fifty. They all intimated that their decision went farther than the Legislature intended to go—consequently, as a foot-race is a lawful game, and as one party who has paid money on a legal contract cannot recall it without the consent of the others, they held that the plaintiff could not recover his stake.

If this case were good law, it would follow that the real

[1] *King* v. *Kemp*, 8 L. T. n.s., 255.
[2] 5 C. B., 818.

test to be applied is, whether or not the money were deposited before the event came off in the hands of a stakeholder.

But the decision was not regarded with much favour in the later case of *Parsons* v. *Alexander*.[1] Plaintiff sued on an account stated for money which had been won at billiards. Defendant having, to start with, a few shillings in his pocket, played the plaintiff for a certain sum and lost. They then played again for "double or quits," and defendant was again unsuccessful. This was repeated until the defendant lost to the plaintiff about £65, for which he gave an I O U. The Court, while intimating doubts as to the correctness of *Batty* v. *Marriott*, distinguished the case before them on the ground that the parties had played entirely on credit, and had not, as in *Batty* v. *Marriott*, deposited the stakes before the event came off.

Per ERLE, J.: "The distinction is between gaming and cases where a person either pays down a contribution to a stake, or holds himself forth as having contributed." Per CRAMPTON, J.: "This was an agreement, if you win, I pay you; if you lose, you pay me."

This distinction suggested by the Court of cases where the money is actually deposited by the parties who play, and cases where it is not, seems also to have occurred to MAULE, J., in *Johnson* v. *Lansley*:[2] "The 18th section seems to treat the money which is in a man's pocket at the time as the reasonable limit to which he may lawfully gamble." So, too, under the older statutes of Charles II. and Anne, as interpreted by *Applegarth* v. *Colley*, there was no objection to gaming so long as the stakes were prepaid.

Some of the Court said that but for *Batty* v. *Marriott*, they would have thought the proviso was confined to subscriptions by outside parties to a prize, and not to deposits by the players themselves. In *Brown* v. *Overbury*,[3] the plaintiff was a subscriber to a race. The stewards could not agree as to the winner. Plaintiff claimed that his horse had won, and brought an action

[1] 1 Jur. U. S., 660. [2] 12 C. B., at p. 472. [3] 11 Exch., 715.

against the stakeholder to recover the stakes, thereby submitting the decision of the race to the jury. At the trial it was contended that he was, at all events, entitled to recover his own contribution. It was not even argued that this case was within the "proviso" as a contribution to a prize. The Court held that as it had not been shown that it had become impossible to obtain the decision of the stewards, he could not call on the stakeholder to return his contribution.

In *Irwin* v. *Osborne*,[1] plaintiff agreed with defendants that a match should be run between a mare, the property of M, and a mare, the property of the plaintiff; that the party who nominated the winner should receive from the party or parties nominating the other mare the sum of £100; and that if either party who nominated a mare should make default in causing such mare to run, he or they should pay the other party £100. The defendants made such default, and plaintiff sued for £100. The Court held that this was not within the proviso of the Statute; there was "no subscription; no contribution; no deposit. This action has been brought, not for a contribution, but to recover a penalty. . . . . For the amount is not made up by a contribution or money deposited, and the winner had to depend on his good fortune in nominating the successful horse. . . The contract depended on an accidental circumstance, not on the running of a race."

Per CRAMPTON, J.: "If it be an ordinary wager it is unlawful; all betting is disallowed, but an exception is made on what I may call a particular species of wagering, namely, a number of persons making a fund, the whole of which is to become the property of the successful party."

It is clear that in this case the test of prepayment of stakes was adopted by the Court, following *Batty* v. *Marriott*.

In *Crofton* v. *Colgan* it seems to have been assumed that a subscription to a race by all the owners of the horses running, and a further sum added by the stewards of the race was within the proviso; but the real dispute in this

[1] 5 Ir. Rep. C. L., 404.

case was on the meaning of the term "winner," which will be fully discussed hereafter. So the case is of no great value in laying down any test or principle for determining what amounts to "subscription" or "prize."

In *Coombes* v. *Dibble*,[1] plaintiff and defendant agreed to ride a race on their own horses, the winner to keep both horses as his own property. *Held* that this was not within the proviso, as there was in no sense a contribution to a prize. Neither party could be said to "contribute" their horses if they won. MARTIN, B., however suggested that if a horse had been placed in the custody of a stakeholder before the race came off, that might have been in the nature of a contribution to a prize within the statute.

So far the balance of authority seems to have been in favour of the decision in *Batty* v. *Marriott* and the test therein suggested, the only dicta to the contrary were the remarks made by some of the judges in *Parsons* v. *Alexander*.

But the point has now been decided the other way by the Court of Appeal and by the Judicial Committee of the Privy Council, in two cases to which we have alluded above on another point, viz., *Diggle* v. *Higgs*[2] and *Trimble* v. *Hill*.[3] In *Diggle* v. *Higgs*, in addition to the point decided above, it was contended for the defendant that the deposits were in the nature of a contribution to a prize; but the Court held—

(1.) That the agreement was a mere wager, in spite of the fact that the money was deposited with a stakeholder;

(2.) That the proviso in favour of subscription to a prize was only meant to apply to agreements which were not in the nature of wagers. Per Lord CAIRNS, L.C.: "It is clear that there may be in scores of forms 'subscriptions or contributions' towards a plate or prize without there being any wager, and I cannot read this proviso, which has a natural and intelligible meaning, in a different way, and one which would have the effect of neutralising the enactment. . . . . I read the proviso thus: 'Provided that so long

[1] L. R., 1 Ex., 248.
[2] 2 Ex. Div., 422; the facts are stated above, p. 52. [3] 5 App. Ca. 342.

as there is a subscription which is not a wager, the second part of the section shall not apply.' "

(3.) That the enactment avoiding wagers applied to all wagers, irrespective of the legality or illegality of the game.

This case was afterwards followed by the Privy Council in *Trimble* v. *Hill*.[1]

Result of foregoing cases.

The foregoing cases do not leave the matter very clearly settled. They afford a number of illustrations of transactions which are *not* within the proviso as subscriptions to a prize; and finally *Diggle* v. *Higgs* lays down the general rule that the proviso is not intended to apply to any case which is at all in the nature of a wager. But with the exception of the case of *Crofton* v. *Colgan*, they do not go far towards showing what is a subscription or contribution to a prize. It is obvious that the exact line of distinction between a wager and a prize is very difficult to draw. *Diggle* v. *Higgs* shows that a mere deposit of stakes to be awarded to the winner of a race between two persons is a wager and nothing more; a decision that would seem to apply to the agreements in *Sadler* v. *Smith*[2] and *Dines* v. *Wolfe*.[3] In both these cases the parties agreed to race, in one case a horse-race and in the other a sculling-race, having previously deposited stakes with the stakeholder to be awarded to the winner, though in the latter cases the point did not arise, as in neither of those actions did the plaintiff show himself to be the winner. Thus the test suggested in *Batty* v. *Marriott* is completely rejected, viz., the distinction between cases where money is deposited before the event and cases where it is not. Another test, hinted by the Court in *Parsons* v. *Alexander*, was between cases where the winnings are contributed by the competitors themselves, and where they are given by some outside person. If this be the true test, the result would be that many *bonâ fide* races would be placed simply on the footing of wagers,[4] at any rate so far as the right of the winner

[1] 5 App. Ca., 342. [2] L. R., 4 Q. B., 214.
[3] L. R., 2 P. C. *Vide post* p. 67.
[4] *Vid. sup.*, p. 34, where this question is fully discussed.

to recover the stakes is concerned. Where the winnings consist of sums deposited and a sum added, the case of *Applegarth* v. *Colley* shows that a distinction can be drawn between the two; the deposits might be in the nature of money won at gaming and so not recoverable, while it was held that the "sum added" by some outside person was under any circumstances recoverable by the winner. It seems that that distinction exists under the present state of the law, and that strictly and technically speaking, the stakes deposited previously to a race are not recoverable; though, no doubt, any sum of money contributed by a stranger would be a contribution to a prize within the proviso; but for the present the matter must be admitted to be in a state of uncertainty.

Distinction between the stakes and a sum added.

II. With respect to the term "winner," some rather curious points have been decided. In *Crofton* v. *Colgan*,[1] the parties subscribed £3 each in respect of their stakes, the stewards of the race subscribing £30. There were two prizes to be awarded. It was contended that this did not come within the proviso as a prize to be awarded to the winner, on the ground that the horse that came in second could not be considered a "winner," and, therefore, as the whole sum was not to be awarded to the winner the statute did not apply. But the Court held (1) that the term "winner" might apply to a second horse as well as to a first; and (2) that, apart from that objection, the mere fact that part of the stakes were not to go to the winner would not take the case out of the statute.

Meaning of term "winner."

2nd horse may be "winner."

Another point arose in *Batson* v. *Newson*,[2] where a man called Hawkins wagered with the plaintiff that his, Hawkins', horse would trot eighteen miles in one hour. Hawkins and plaintiff deposited £50 each with defendant as stakeholder to abide the event. The referee decided in Hawkins' favour, but plaintiff, disputing the decision, gave notice to defendant to pay him back his stakes. Defendant disregarded the notice, and paid the whole to Hawkins. Plaintiff sued to

[1] 10 Ir. Rep., C. L., 133. [2] 1 C. P. D., 573.

There must be a "loser."

recover his deposit. *Held*, that the agreement was a mere wager; there could be no winner in such a case as only one person was to do anything. In such a case there could be no "loser," and without a loser there can be no winner. It will be remembered that in *Applegarth* v. *Colley* the same view was taken as to the meaning of the term "winner of £10" in the Statute of Anne, and the Court there held that a man could not be said to be a winner of £10 within the statute, unless there were a corresponding loser of the same sum. It would seem, too, that a person cannot be called a winner unless he either take some part himself in a competition or be the owner of an animal engaged therein. Thus in *Irvine* v. *Osborne*[1] the plaintiff and defendants simply nominated the winner of a race, the person who nominated the successful horse to have the stakes. Plaintiff nominated a horse not belonging to himself. *Held*, that he could not be a winner of the race, as "the contract depended on some accidental circumstance, not on the winning of a race."

Winner must be a competitor in the race, &c.

Disputes as to the winner.

It is obvious that any person suing to recover stakes as winner has cast upon him the burthen of proving himself to be such. The determination of such a question will generally depend upon agreement or special conditions by which competitors agree to be bound. Thus, horse-races are generally run either subject to the rules of the Jockey Club, or subject to specially advertised regulations. However, it may be taken that the winner is declared by the judge, all further questions or objections—as to, for instance, qualification—being decided by the stewards.

The judge.

With respect to the authority of the judge to declare the winner, the conditions upon which it is exerciseable must be strictly observed, and the same in the case of the arbitrators or umpires of other kinds of races. In the head note to *Carr* v. *Mallinson*[2] it is stated the power of the judge of a horse-race to award the stakes to a winner does not arise until the race has been run! This extraordinary point arose in the following way: the parties agreed on a race between

[1] 5 Ir. Rep., C. L., 404. [2] 28 L. J., Q. B., 126.

their respective horses, naming both a starter and a judge, and fixing a particular hour on a certain day. The stakes were deposited with the defendant, to be handed over to the winner according to the decision of the judge. The parties made their appearance, but the starter did not turn up. One of the parties refused to run and the plaintiff walked over the course and was declared by the judge to be the winner. But the Court held that the presence of the starter was, by the agreement, a condition precedent to the race, and so to the judge's authority. There had been no starter and so no race; consequently, the judge's authority to declare the plaintiff winner did not arise. The other point decided in this case as to recovering stakes has been noticed above.

N.B.—This case by no means decides that an umpire never has power to award the stakes to a person whose horse has simply walked over the course.

A somewhat similar point occurred in *Smith* v. *Sadler*.[1] The plaintiff and K deposited stakes with the defendant to abide the event of a sculling race between themselves, "to row according to the recognised rules of boat-racing." The decision of the referee to be final. It was proved in evidence that according to custom in a sculler's race between watermen the men start themselves, but in the event of either or both making a default in starting, the referee was entitled to interfere. At the time appointed, a great difficulty took place in the men starting themselves. K complained to the referee, who told him to give notice to the plaintiff that if he did not start, K was to row over the course without him. K rowed over without giving plaintiff such notice. The referee, without further inquiry, ordered the stakes to be paid to K. Plaintiff sued to recover his deposit, thus disputing the decision of the referee. For the defendant (*i.e.* practically in favour of the referee's decision) it was argued—(1) That the referee was in the position of an arbitrator; that therefore not even misconduct on his part could be pleaded in answer to an

Smith v. *Sadler*, L. R., 4 Q. B., 214.

[1] L. R, 4 Q. B., 214. See, too, *Evans* v. *Pratt*, 3 M. & G.

action on the award; but the award must first be set aside; (2) that the referee had virtually decided that there had been a proper start and a proper race, and that according to the authorities such decision was binding. The Court however held (1) That the cases as to setting aside the award did not apply because the jurisdiction of the referee had never arisen. The order he had given to K was conditional and K had not carried it out; therefore the race had never been rowed and there was nothing for the referee to decide. (2) That although *primâ facie* it would be implied from the award of the stakes that there had been a proper start and a race, that inference had been rebutted by the evidence given at the trial. Therefore the referee never had authority to declare K the winner, and the plaintiff was entitled to recover his stake from defendant[1].

Decision of stewards.

Wherever it is made part of the conditions of a horse-race that the decision of the stewards shall be final, it is not competent for any party to question their decision, and it seems that they are not in the same position as arbitrators. They are not bound to hear the parties before deciding, they need not give a joint decision, they are not disqualified by having an interest in the race. Thus in the case of *Benbow* v. *Jones*[2] the plaintiff was the owner of the horse that came in first, but the steward had previously decided without hearing him, that his horse was disqualified. The Court held that these circumstances did not prevent the decision being final. As ALDERSON, B., humorously expressed it, the next contention would be that the steward was bound to hear the parties on oath and counsel on both sides. In *Parr* v. *Winteringham*,[3] where the stewards gave separate decisions without consultation, it was held that this was sufficient. In *Ellis* v. *Hopper*[4] a steward was held not to be disqualified by his having made a bet on the race. In *Brown* v. *Overbury*,[5]

[1] The point was not taken in this case that the agreement was in the nature of a wager and the plaintiff therefore entitled to revoke the stakeholder's authority, but it will be observed that the defendant had paid over the money *without receiving notice from Plaintiff*.

[2] 14 M. & W., 193.
[3] 28 L. J., Q. B.
[4] 28 L. J., Exch., 1.
[5] 11 Exch., 715.

where the stewards could not agree as to the winner, it was held that the exclusive right of the stewards to decide lasted until it had become impossible to obtain their decision.

Again in *Dines* v. *Wolfe*[1] the facts were as follows. Agreement between plaintiff and A for a race between their respective horses for £500 aside, weight for age, to be run under Australian Jockey Club rules; £100 aside deposited with defendant as stakeholder, balance to be paid to defendant fourteen days before the race. According to the rules of the Jockey Club, the stakes ought previously to the race to have been paid over to the Treasurer of the Jockey Club, but plaintiff insisted on their being retained by defendant. A's horse won; after the race, plaintiff, finding that A's horse had only been weighted as a four-year-old, objected that he was a five-year-old. He wrote a letter to this effect to the stewards, objecting to A's horse being declared winner. By the rules of the Jockey Club, when the age or qualification of a horse was objected to, either before or after the running, the stewards should call for such evidence as they might require, and their decision was to be final. The stewards met to consider their decision and the plaintiff produced certificates as to the age of A's horse; after the meeting had been several times adjourned, the plaintiff demanded another adjournment, which the stewards refused. They finally decided in favour of A's horse. The defendant paid over the money to A. It does not appear that the plaintiff had previously demanded his stakes back from defendant.

Plaintiff sued defendant for the whole of the stakes as winner of the race. He contended (1) that the rules of the Jockey Club had not been complied with, inasmuch as the stakes had not been deposited with the treasurer of the Club; therefore the race had never been run according to agreement; (2) that the stewards had not fairly decided the case, having refused his request for a further adjournment.[2]

[1] L. R., 2 P. C. 280.

[2] The laws with regard to wagers in N. S. Wales, if, indeed, they were in any way material to this case, seem to be a reproduction of 8 & 9 Vict., c. 109. *Trimble* v. *Hill*, 5 App. Ca. 342.

The jury awarded the plaintiff £500 (the amount of his own stakes) on the ground that the rules of the Jockey Club had not been complied with. The Supreme Court granted a new trial, and from this plaintiff appealed to the Privy Council. The judgment of the Privy Council was delivered by Lord CHELMSFORD. Plaintiff could not recover the whole of the stakes without a decision of the stewards that he was the winner. He could not recover even his own stakes back unless he had repudiated the agreement before the race was run (*i.e.*, run according to the agreement). The plaintiff could not maintain his objection that the agreement had not been complied with, as he himself had consented to the money remaining in the stakeholder's hands instead of being paid over to the treasurer; further, that plaintiff in writing to the stewards was really claiming the benefit of the rules, and could not therefore be heard to say that the race was not run under them. *Held*, also, that the stewards had acted *bonâ fide*, and that according to the rules there was no appeal from their decision.

Stewards' decision on points of construction.

In *Newcomen* v. *Lynch*[1] it was held, where the rules of a race provide that the decision of the stewards should be final, that applies to questions of construction of the rules of the race, as well as to questions of fact.

Construction of agreement by the Court.

But where the agreement does not contemplate any special method of deciding disputes, the Court will construe it. If necessary, parol evidence will be admitted to explain conventional or sporting terms.

Parol evidence.

Thus, in *Hussey* v. *Crickett*,[2] evidence was admitted to explain the term "Rump and dozen." In *Evans* v. *Pratt*[3] it was explained that an agreement for a steeplechase "across country" meant a course over all obstructions, and prohibited going through open gates.

In *Daintree* v. *Hutchinson*[4] there was an agreement between plaintiff and defendant for a dog match to be run on the Wednesday during the Newmarket February Meeting, 1841,

[1] Ir. Rep., 10 C. L., 248.
[2] 3 Camp.
[3] 3 M. & G., 759.
[4] 10 M. & W., 85.

P.P. Plaintiff was member of the Newmarket Club, but defendant was not. By the rules of this club, the February Meeting was fixed at the previous November Meeting, for a certain date, weather permitting. On the day of the meeting there was a hard frost, and the club adjourned to another day, weather permitting. The meeting had again to be put off to a subsequent Tuesday. On the Wednesday after that the plaintiff appeared, ready to run the race, but defendant did not turn up. Defendant contended that the agreement meant the Wednesday in the week originally fixed for the Newmarket Meeting. But the Court held that the rules of the club was admissible to show that the meeting was what Baron PARKE called a "moveable feast," and that the true construction was that the race should come off on the Wednesday in any week in which the meeting should actually take place. *Held*, also, that parol evidence was admissible to explain that the letters P.P. meant that the parties were either to run the match or forfeit the stakes.

"Gentleman rider."

As to the construction of the term "gentleman rider," see *Walmsley* v. *Mathews* (3 M. & G., 133).

Games and sports within the Act.

III. What are "lawful games, sports, or pastimes or exercises" within the Act?

The question can be best answered by showing what games are unlawful either at Common Law or by statute. Some have a history. Thus horse-racing was for a long time subjected to considerable restriction. It will be remembered that by the Statute of Anne, section 5, it was made penal to win any sum over £10 at any one time, by means of gaming. It was always understood that horse-racing, which was expressly mentioned in the Statute of Charles II., was a game within the Statute of Anne, the games in both statutes being the same.[1] The result was, as is shown in *Evans* v. *Pratt*,[2] that a horse-race for a prize of over £10 was held to be illegal. Curiously enough, in *Applegarth* v. *Colley*, an entirely

Horse-racing.

[1] See *Blaxton* v. *Pye*, 2 Wils., 309; *Applegarth* v. *Colley*, 10 M. & W., 723.
[2] 3 M. & G., 768.

different construction was put upon those statutes by the Court of Exchequer; it being there held that the statutes did not affect a case (1) where the stakes were deposited with a stakeholder before the race was run, the statutes aiming at gaming on credit and "contracts for the payment of money won at gaming;" (2) where the stakes were made up of subscriptions under the value of £10, the term winner of £10 only contemplating a case where there was a corresponding loser of that sum. However, by the time that this case was decided, all restrictions on horse-racing had been wiped off the statute books: so that this more lenient construction of the earlier prohibitive statutes came rather late.

The immediate result of the statutes was that a large number of races were started for small prizes under £10, so as not to infringe the Act, a practice which tended to deteriorate rather than improve the breed of horses. To remedy this the Statute 13 George II., c. 19, was passed, which prohibited any horse-race being run except at Newmarket or Blackhambleton in Yorkshire, for any prize of less value than £50. It also prescribed some arbitrary regulations as to the weights which horses of certain age should carry. The object, of course, of this statute was to prevent horse-races being run where the prize was not sufficiently remunerative to encourage the improvement in the breed. The Statute 18 George II., c. 34, repealed so much of the previous statute as related to the carrying of weights, but the other provisions of 13 George II., c. 19, which restricted the practice of horse-racing, remained in force until the passing of 3 & 4 Vict., c. 35. By this statute all the enactments of 13 George II., c. 19, relating to horse-racing, were repealed. In *Evans* v. *Pratt*[1] a question was raised as to the exact effect or result of this statute. The plaintiff sued to recover the stakes of a steeplechase "across country," of which he had been declared winner. The main point was whether such a steeplechase for a prize of more

13 Geo. II., c. 19.

18 Geo. II., c. 34.

3 & 4 Vict., c. 35.

Evans v. *Pratt*.

[1] 3 M. & G., 765.

than £10 was within the Statutes of Charles II. and Anne. It was argued on the one hand, that by the repeal of the earlier Statute of George II., without mentioning the Statutes of Charles II. and Anne, the law as it existed under the latter, was virtually restored, and, therefore, that a race for £10 was illegal. On the other hand, it was contended that the restrictions on horse-racing contained in the Statutes of Charles II. and Anne were repealed by 13 George II., c. 19, which substituted other provisions; and that the repeal of the latter statute had given "a new charter to horse-racing." The Court held that the Statute 3 & 4 Vict., c. 35, had legalized all horse-racing, and that steeplechases were included in that term.

All horse-racing made legal.

The only restriction in modern times to which horse-racing has been subjected is in the case of races within ten miles of London, the increase of which had been productive of great inconvenience.

42 & 43 Vict., c. 18. Horse-races near London require a licence.

By 42 & 43 Vict., c. 18, it is provided—

By section 1, a horse-race is in substance defined to be any competition between horses, or any race against time for any prize or any wager in respect of any such horse, at which more than 20 persons shall be present.

Section 2 makes all horse-races within 10 miles from Charing Cross unlawful unless licensed.

Sections 3 and 4 prescribe the method of obtaining such license.

Section 5 inflicts a penalty of £10 or two months on any person taking part in such unlicensed horse-race.

Section 6 inflicts a penalty of from £5 to £25 on owner or occupier of ground where such race takes place.

Section 7 makes any horse-race contrary to the Act a common nuisance.

Cock-fighting seems to have been illegal at Common Law. In "Bacon's Abridgment" it is stated that an information would lie at Common Law for using the game of cock-fighting. In *Squiers* v. *Waiskin*, Lord ELLENBOROUGH described it "a barbarous diversion not to be encouraged in a Court of Justice.

I believe that cruelty to these animals in throwing at them forms part of the dehortatory charge of judges to grand juries." It was forbidden in the metropolis by 2 & 3 Vict., c. 47, section 47, under a penalty of £5, and by 12 & 13 Vict., c. 92, the same penalty is inflicted for keeping or using any "place" for the purpose of fighting or baiting any bull, bear, badger, dog, cock, or other animal. But these Acts[1] only apply to a place kept for the purpose. A case was lately noticed in the newspapers of a cock-fight having taken place on board a ship out at sea, and the question was suggested whether this could be a "place" within the Act. It should be remembered that the Statute 4 George IV., c. 60, defines the word "place" in previous statutes as including places "on land or water."

Billiards is a perfectly lawful game,[2] except that the keeping of public tables is subject to restrictions. By 8 & 9 Vict., c. 109, sections 11 and 13, it is necessary for the keeper of any public house, or any person setting up a public table, to take out a license for the same. It is made penal to allow playing on such table between the hours of 1 a.m. and 8 p.m., or in the case of a licensed victualler's at any time when his premises may not be open for the sale of intoxicating liquors. However, a subsequent statute 37 & 38 Vict., c. 49, section 10, empowered licensed victuallers to sell liquor at any time to persons residing on their premises, but it has been held that that does not authorise the playing of billiards except at the times mentioned in the previous statute; it was, the Court said, a *casus omissus* in the statute[3]. So of course games played on public tables at other than the authorised hours are not within section 18 of 8 & 9 Vict., c. 109.

Lotteries are illegal, as will be explained in a future part of this work.

By 12 George II., c. 28, section 2, *ace of hearts, pharaoh,*

[1] *Morley* v. *Greenhalgh*, 32 L. J. M. C., 93.
[2] See *Parsons* v. *Alexander*, 1 Jur. N. S., 660.
[3] *Ovenden* v. *Raymond*, 34 L. T. N. S., 199.

bassett, and *hazard*[1] are declared to be illegal games, to which list 13 George II., c. 19, section 19, has added the games of *passage* and any game with one or more dice or instrument in the nature of dice with one or more figures or numbers thereon, except *backgammon*.

18 George II., c. 34, provides that no person shall keep any house or place for playing *roulet* or *roly-poly* or any game with cards or dice prohibited by law.

A number of games were made unlawful by a statute 33 Henry VIII., c 9, on the ground that they diverted people's attention from the pursuit of archery. Among these were *bowling*, *coyting*, *tennis*, when played by artificers and apprentices; and all persons were bound, under penalty of 6s. 8d., to provide themselves with bow and arrow. But these provisions of the statute were repealed by section 1, 8 & 9 Vict., c. 109. 33 Henry VIII., c. 9.

Dominoes has been held to be a lawful game.[2]

The subject of unlawful games will be more fully treated in the chapter on Gaming-Houses.[3]

All the statutes against unlawful games contain exceptions in favour of royal palaces during the actual residence of the Sovereign. Exception in favour of Royal Palaces.

As to what constitutes a royal palace see *Coombe* v. *De la Bere* (22 Ch. Div. 316) and cases therein quoted.

[1] As to hazard, see *McKinnell* v. *Robinson*, 3 M. & W.
[2] *R.* v. *Ashton*, 22 L. J. M. C., 1.
[3] See particularly the account of the Park Club Case (*post* p. 130.)

CHAPTER II.

TRANSACTIONS ON THE STOCK EXCHANGE.

It has been deemed advisable to treat of transactions on the Stock Exchange under a separate heading: not that they are, in the main, subject to different statutory provisions; but as the facts in these cases are of a very special character and to a great extent stand on common ground, it will probably facilitate reference if they are all grouped together instead of being scattered over the rest of the work.

It will be remembered that wagering transactions of this description were not touched by the earlier statutes of Charles II. and Anne, which applied solely to games and pastimes. So that until the passing of the statute we are about to mention, time-bargains, as they have been called, were not only lawful but were enforceable by action.

7 Geo. II., c. 8. The earliest statute on this subject was 7 George II., c. 8, commonly called Barnard's Act, which provided—"That all contracts or agreements upon which any premium should be paid for liberty to put upon, or to deliver, receive, accept, or refuse any public or joint-stock or public securities whatsoever . . . . and all wagers and contracts in the nature of wagers, and all contracts in the nature of puts and refusals relating to the then present or future value of any such stock or securities as aforesaid, shall be null and void." The statute also inflicted penalties both for entering into such contracts and for making payments in respect thereof.

Statute only applied to public English stocks. The statute only applied to English public stocks, and not to foreign stocks nor to shares in companies.[1]

It also made the contracts and compounding for differences

[1] *Wells* v. *Porter*, 3 M. & W., 722; *Lyne* v. *Sieafield*, 1 H. & N., 278; *Williams* v. *Trye*, 23 L. J. Ch., 860.

not merely void but illegal. Thus in *Cannan* v. *Bryce* it was held that money lent for the purpose of compounding such differences could not be recovered. But in *Tickney* v. *Reynons*,[1] where a bond was given to repay money advanced by plaintiff to settle for differences, it was held that the bond was good.[2]

The case of *Nicholson* v. *Gooch*[3] was an important case under this statute, and also seems to have some bearing on Stock Exchange transactions at the present day. *Nicholson* v. *Gooch*, 5 E. & B., 999.

The bankrupt Lodge was a member of the Stock Exchange and the defendant was the official assignee of that body. By the rules of the Stock Exchange every member unable to fulfil his engagements was declared a defaulter, and all members indebted to him in respect of Stock Exchange transactions were to pay their debts to official assignees appointed by the Stock Exchange, whose duty it was to distribute the money received rateably among his Stock Exchange creditors. On 11th November, Lodge wrote to the secretary to say he could not meet his engagements, and large sums were paid to defendant by members who where his debtors. On 23rd November a petition in bankruptcy was presented against Lodge; on the 31st, Lodge was adjudicated bankrupt. The plaintiffs were Lodge's assignees in bankruptcy. It seemed from the evidence that according to the customary way of dealing, speculative transactions and genuine sales were so mixed up, that it was impossible to separate the two; but the jury found that the majority of the transactions were speculative and the parties merely intended to settle differences. It seemed that the method of settling these differences was for the members on the account day to set off the amount of stock which they had respectively agreed to buy and sell, and by a fictitious bargain for the sale at the price of the day of as much stock as would cover the balance, and then settle by paying the difference in the price. The plaintiff sued

[1] 4 Burr, 2070.
[2] 3 B. & Ald., 179; compare *Mortimer* v. *MacCallan*, 6 M. & W., 58, where the stock was actually delivered to the vendor.
[3] 5 E. & B., 999.

defendant for the moneys they had received from Lodge's debtors. The Court drew an inference of fact that they were all contracts for differences only. *Held*, that the settling of differences without actual delivery of stock was, so far as the public stock was concerned, illegal by section 5 of Barnard's Act. That money paid to defendant in pursuance of this illegal arrangement, and forming the fund sought to be recovered, could not be recovered, as it could not form part of Lodge's estate.[1] Therefore the assignees had no title to it.

It had been attempted on the plaintiff's behalf to apply the doctrine of *Tennant* v. *Elliott*, and so prevent the defendant from setting up the illegality against them.[2] But the Court held that this did not apply, because defendant received the money, not as agent for Lodge or for his use, but on an implied mandate to distribute it according to the rules of the Stock Exchange.

Position of Official Assignee of Stock Exchange.

CRAMPTON, J., distinguished the receipt of money for differences on public stock which was illegal, and on ordinary shares which were not within the statute. In the latter case the doctrine of *Tennant* v. *Elliott* might have applied if defendant had received the money as Lodge's agent, and subject to his disposal. But the receipt seems to have been under *an adverse claim* by virtue of the Stock Exchange rules rather than as agent of the bankrupt.

Of course to a great extent the importance of this case was diminished by the Statute 23 & 24 Vict., c. by which Barnard's Act was repealed. At the same time it seems still of importance as showing the position of the official assignee of the Stock Exchange, *i.e.*, the agent of the Stock Exchange, to distribute the money according to their rules; the defaulter, as a member of that body, binding himself to authorise the money in the event of his default to be paid to the Stock Exchange or their agent.

Repeal of Barnard's Act.

[1] The Act provided that money paid to settle differences could be recovered back by an action, sect. 5.

[2] 1 B. & P., 3—viz., that an agent cannot set up the illegality of a transaction in answer to the principal's claim for an account.

A late case bearing on this topic, and to a great extent confirming the views of CRAMPTON, J., in *Nicholson* v. *Gooch*, is that of *ex parte Grant re Plumbly*.[1] Plumbly declared himself a defaulter and on the same day presented his petition in bankruptcy. By virtue of his being a defaulter the official assignee, as stated above, became entitled to receive money due to him for differences. An injunction was obtained in bankruptcy against the official assignee, against receiving and collecting such debts, and an order to pay all sums that he had received to the trustee in bankruptcy. Against this order the official assignee appealed. *Ex parte Grant*, 15 Ch. D.

The evidence chiefly consisted of affidavits filed by leading members of the Stock Exchange. Some points in these affidavits call for special notice.

(1.) That contracts on the Stock Exchange are never for payment of differences, but are real transactions for cash . . . contemplating transfer or delivery of the stocks, &c. The transfer and payment can only be rendered unnecessary by a new and equally real bargain, on the one part to accept and pay for on the same day, and on the other part to transfer or deliver, an equivalent amount of the same stocks, &c.

(2.) Members having bargains open in stocks and shares which the defaulter has contracted either to take or deliver, but which contracts he breaks by his default, pay to the official assignee the difference in value of the stocks, &c., as determined by the prices fixed by the official assignee, at the time of such default, when the change in price is against such members; and on the other hand become entitled to claim against the fund so created in the hands of the official assignee for any such differences when in their favour.

(3.) The defaulter cannot claim differences on damages in respect of contracts which he has broken by his default, nor can he claim the moneys payable as differences under the rules to the official assignee.

(4.) Had Plumbly not become a defaulter nor a

[1] 13 Ch. D., 667.

liquidating debtor, and had all the contracts been duly performed by him, none of the differences received by the official assignee would have found their way into Plumbly's possession. In payment of differences, bank notes and cash do not pass and cannot be demanded. All payments on account of differences must be by crossed cheques on a clearing house banker, and the whole of the differences which a member is entitled to pay or liable to receive on each account day must all pass through the Clearing House together. If the balance is in his favour, he receives only the difference; otherwise, the general balance of all his dealings goes to his debit through the operation of the bankers' clearing. The credit differences of each member are thus directly hypothecated for the payment of his debit differences.

The reader is referred generally to the affidavits in the case, which are set out *in extenso* in the report; but the above will be sufficient to render the judgment intelligible. *Held* (1) that the official assignee received the moneys by a title adverse to the trustee, who on that account could not claim them as received to his use. (2) The fund claimed was an entirely artificial fund, created by the rules of the Stock Exchange: if the contracts were winning ones, the trustee could not have enforced them at law, as the defaulter had shown his incapacity to perform the contracts himself: so that the differences could never have been payable to the trustee who was now claiming them. (3) That the trustee could not take advantage of those rules, to which alone the fund owed its existence, and claim the moneys, without also complying with them with respect to the distribution; *i.e.*, he could not claim for distribution among the general body of creditors. JAMES, L.J., put the case on a more general ground. If A owes money which is claimed by B and C, and he pays B, C cannot sue B; but payment does not discharge A, if wrongful.

The case shortly seems to come to this:—"Differences" are payable simply by the rules of the Stock Exchange, and not as a matter of contract between two parties; being payable

to the official assignee by virtue of those rules, the fund thereby created in his hands must be subject to the same rules. That the official assignee receives these differences in his own right and not to the use of the defaulter's trustee in bankruptcy.

It seems, then, that even if bargains for "differences" were known on the Stock Exchange (which it appears they are not), the rights of the official assignee with respect to them as against the trustee in bankruptcy would be governed by the above case, as he could only receive them under the rules, and not as a legal debt. The two cases seem to a great extent to stand on common ground, though the former was not cited in argument in the latter. In both it was held that the title of the official assignee was adverse to that of the trustee in bankruptcy, so that the former could in no sense be considered his agent. In both the ratio of the decision was that the fund was entirely artificial and owed its existence to the Stock Exchange rules, as the moneys which formed the funds were irrecoverable at law. They were irrecoverable in *Nicholson* v. *Gooch* on the ground that the payments were in pursuance of illegal or void contracts; and in Plumbly's case there was the additional reason pointed out that as he by his default was incapable of performing his part of the contract, he could not enforce it himself.

Nicholson v. *Gooch* and *ex parte Grant* compared.

The next statutory provision concerning this class of cases is contained in the statute we have discussed above, declaring all wager-contracts to be void. The question of the application of this statute to Stock Exchange transactions, depends upon how far such transactions are in the nature of wagers.

8 & 9 Vict., c. 109.

The Courts have more than once been called upon to adjudicate upon what have been supposed to be contracts for the payment of "differences," that is the difference between the present and the future price of stock. Contracts of this sort have been called "time bargains"; a phrase we shall avoid, as it seems to be used in more senses than one. An instance of such a contract, or rather of a contract which the jury

Contracts for payment of differences.

found to be of this nature, is to be found in *Grizewood* v. *Blane*.[1] It will be seen that the bargain as the jury found the facts took the form of two collateral bargains, the result of which was that differences only passed between the parties.

Grizewood v. *Blane*, 11 C. B., 526.

The bargain was that plaintiff should purchase of defendant, and defendant should sell to plaintiff a certain number of shares in certain companies at a specified price. The said shares rose in price. The parties then entered into a second agreement to rescind the former one, and that defendant should buy of plaintiff the same number of similar shares at such increased prices, and that defendant should merely pay the plaintiff the difference between the two prices.

Defendant pleaded generally that the contracts were void under the statute, which plea was held bad, for not stating the facts which brought the case within the statute.

The case went to trial on issues of facts raised in the pleadings—that the contract was by way of wagering on the price of the shares, and was merely colourable; that it never was intended that the said shares should be bought and sold, but was a mere wager.

The plaintiff was a stock jobber; and the defendant had dealt with plaintiff through his broker. Evidence was given to show the former course of dealing between parties, that no shares ever passed, but the parties merely settled differences.

Test of a gaming transaction.

Jervis, C.J., directed the jury that if at the time of making the first contract the intention of the parties, as understood by both of them, was neither to purchase nor sell the shares, but only to settle differences, then the transaction was void under the statute.

The Court held that this ruling was right. The jury found that it was a mere gambling transaction—*i.e.*, that it was the intention of the parties at the time that there should be no actual acceptance or delivery of the shares.

This finding of the jury upon the facts of this case have

[1] 11 C. B., 526.

been questioned in later cases, probably through the Courts being in possession of more complete information as to the true nature of transactions on the Stock Exchange. Thus BRAMWELL, L.J., in *Marten* v. *Gibbons*,[1] and BRETT, L.J., in *Thacker* v. *Hardy*,[2] both express their doubts as to the correctness of the view the jury took of the facts. The case had one peculiar feature, viz., that it was an action by a jobber against the principal on transactions affected through a broker, and as evidence was given of a long course of dealing between the parties, there may have been special circumstances in the case. It is remarkable that in *Cooper* v. *Niel*[3] the jury there found that the contract was simply for the payment of differences; but again BRETT, L.J., in *Thacker* v. *Hardy*[4], says he could see no evidence of it.

In the former case the broker became insolvent, and his trustee sued the defendant for indemnity in respect of the claims of the jobbers. But as the jury found that the contracts were mere wagers, the jobbers could not claim in respect thereof against the estate of the broker, and, being insolvent, payment could not be enforced against him by the rules of the Stock Exchange.

From the cases to which we are about to refer it would appear that in point of fact transactions on the Stock Exchange never do take the form of contracts for the mere payment of differences. Thus in *Thacker* v. *Hardy*,[5] from a remark in LINDLEY, J.'s judgment at (p. 689), it seems to have been stated by witnesses that time-bargains are unknown on the Stock Exchange. The real nature of the agreement in that case was found by LINDLEY, J., to have been as follows:—(1) That defendant was a speculator and employed plaintiff, a stock broker, to speculate for him on the Stock Exchange. (2) Defendant knew that in order to do so plaintiff would have to enter into contracts to buy or sell stocks, &c., and, to protect himself, to make other contracts

Contracts for differences not really known on Stock Exchange. *Thacker* v. *Hardy*, 4 Q. B. D.

[1] 33 L. T., n. s., at p. 563.
[2] 4 Q. B. D., at p. 695.
[3] W. N. C., 1 June, 1878. See, too, *Barry* v. *Crosskey*, 2 J. & H., 1 where this test was adopted.
[4] At p. 694.
[5] 4 Q. B. D., 685.

to sell or buy respectively. (3) Plaintiff knew, as was the fact, that defendant never intended to accept or make actual delivery of the stocks, &c., bought or sold for him. (4) That defendant took the risk of having to accept or deliver, &c., hoping that plaintiff would be able so to arrange matters that nothing but differences would be payable to or by defendant. (5) That otherwise defendant would be unable to pay for what was bought or deliver what was sold.

Plaintiff brought an action for indemnity for what he had been called upon to pay in respect of these transactions.

A case between broker and principal.

This was a case it will be noticed turning on dealings between a broker and a member of the outside public, and so differed from *Grizewood* v. *Blane*. The judgment of LINDLEY, J., decided the following points:—

(1.) That agreements between buyers and sellers of stock to pay differences are gaming contracts within 8 & 9 Vict., c. 109, s. 18.

(2.) That that section of the statute only affects the contract which constitutes the wager. In this case plaintiff was bound to enter into the contract himself as principal. The contract between himself and the real principal was not a wager-contract, but an implied contract of indemnity.

(3.) That an agent is entitled to be indemnified against all liabilities incurred on behalf of his principal, unless such were illegal.

(4.) That the statute made gaming transactions void, and not illegal.

(5.) It had been argued that such gambling transactions were illegal at Common Law on the ground of public policy, relying on Lord TENTERDEN'S opinion in *Bryan* v. *Lewis*. But this was overruled in *Hubblethwaite* v. *M'Morrine*.[1] Besides, it had required a special Act of Parliament to make gambling in the funds illegal, and that Act was repealed by 23 & 24 Vict., c. 28.

(6.) He did not infer as a fact that this contract was a contract for differences. The real nature of the transaction is stated above.

[1] 5 M. & W., 426.

It will be seen, therefore, that the judgment treats of the case from two points of view: first, granted the main contract were in the nature of a wager. *Held*, in this case, that according to previous authorities, the right of an agent to be indemnified was not affected. Second, that as a matter of fact, there was no wagering in the transaction at all, so that 8 & 9 Vict., c 109, did not affect the question.

The case was taken up to the Court of Appeal, where the view taken by LINDLEY, J., as to the facts was confirmed; consequently it became unnecessary to consider the application of the statute to the case.

BRAMWELL, L.J., said he would assume that the broker might by the terms of the bargain be called upon to resell the stock, so that the principal would only have to pay differences. That would not infringe the statute as a gaming contract, for the principal might at any time elect to take the stock and hold it as an investment . . . also the broker might be unable to sell, if, for instance he had bought shares in an insolvent bank. There is no wagering in a transaction of that kind—the broker has no interest in the stock—it does not matter to him whether the market rises or falls; but when a transaction comes within the statute against gaming and wagering, the result of it does affect both parties.

Ex parte Rogers.

In *ex parte Rogers*[1] the facts seem to have been substantially the same. A stock broker named Evans issued a debtor's summons against Rogers in respect of money due to Evans on the purchase and sale of stocks and shares on Rogers' behalf, and for commission, and for money paid by Evans for carrying over[2] a portion of the said stocks and shares. The contracts were made by Evans, subject to the rules of the Stock Exchange, according to which Evans had to deal as principal as between himself and the jobbers. It was understood between Evans and Rogers that the latter was only buying for the rise and never intended to accept delivery, but meant to sell them again before the next

[1] 15 Ch. Div., 207. [2] As to carrying over, see *post* p. 90.

account day and receive or pay differences. Evans admitted that sometimes in buying the same kind of stock for two clients he bought the whole amount in one from the jobber, and then resold to the clients, but he could not say whether that had been done in respect of any transactions for Rogers. There was also evidence to show that Rogers had met Evans in his office, and authorised him to borrow money and pay the jobbers. It was sought on behalf of the debtor to distinguish the case from *Thacker* v. *Hardy*, on the ground that the broker had acted as a principal and not as an agent, having purchased for himself and resold to his clients, and that the transaction being in the nature of a wager was illegal (? void). But the Court held that there was sufficient evidence that the broker had paid money at the debtor's request, therefore the case was within *Thacker* v. *Hardy*.

Ex parte Grant, 13 Ch. Div. Dealings between members of the House.

The case of *ex parte Grant*,[1] to which we have alluded above, is important on the present subject, chiefly from the evidence given in the case as to the course of dealing on the Stock Exchange, which seems to confirm the finding of LINDLEY, J., and the Court of Appeal, as to the facts of the case in *Thacker* v. *Hardy*. At p. 671 it is stated: "Contracts on the Stock Exchange are never for payment or receipt of differences. All contracts, &c., are real transactions for cash or for a day named, contemplating the actual transfer or delivery . . and which transfer or delivery can only be rendered unnecessary by a new and equally real bargain on the one part to accept and pay for on the same day, and on the other part to transfer or deliver an equivalent amount of the same stock." It is then further stated that if a member having, say, bought stock which he was unable or unwilling to take up, he balances the transaction by selling a similar amount of (but not the identical) stock for the same settling day for which the bargain was originally made, so as to enable that particular transaction to be written off and balanced. "The whole amount of stock or shares to be taken and delivered balances itself at all times, but the amount of

[1] 13 Ch. Div., 665.

stock to be accepted from or delivered to the several persons with whom any member has dealings, is liable to vary with every new transaction entered into." "When the settling day arrives each member only transfers or delivers and accepts and pays for the then balance of each particular description of stocks or shares contracted for with each person with whom he has dealt."

Differences, how adjusted.

The affidavits in this case should be carefully perused as they afford a great deal of information as to the method of doing business on the Stock Exchange. It seems clear that the transactions there described can in no sense be in the nature of wagers—they consist of an original purchase or sale and a subsale or sub-purchase, the latter being probably to a person who was not a party to the original contract. Possibly if the subsale or sub-purchase were made between the original parties and were contemporaneous with the first contract, this might according to the case of *Grizewood* v. *Blane* amount to a wager, but this method of dealing seems to be unknown on the Stock Exchange.

No doubt the transactions which go on may be made a means of reckless gambling; but it is necessary to bear in mind LINDLEY, J's. warning in *Thacker* v. *Hardy* against being misled by an epithet.

It seems probable, therefore, in view of the facts laid before the Court as to the customary course of dealing on the Stock Exchange, and particularly having regard to the decision in *Thacker* v. *Hardy*, that the statute will have but little application to Stock Exchange transactions. Bargains may no doubt in many cases be mere speculations on the part of one party, but it is clearly stated by many witnesses before the Stock Exchange Commissioners in 1878, that a man's intentions as to holding or reselling his purchases is not known to the other party, so that it cannot be a wager as between the two.

Effect of 8 & 9 Vict., c. 109, likely to be very small on the Stock Exchange.

That this is the real state of the case is shown by the evidence given by Mr. Pyemont before the Stock Exchange Committee in 1878 (*see* p. 315). "With regard to wagering

and gaming, I may say that it was in consequence of the remarks of the Lord Chief Justice which appeared in the *Times* the other day, that I was led to tender my evidence; I was sorry to see, in so high a quarter, such a total misapprehension of the action of the Stock Exchange. We have no such transaction on the Stock Exchange as wagering and gaming. The only possible approach to anything of the kind was dealing in dividends, which was always reprobated by the Committee. The accounts were never recognised if there were failures; and finding that not recognising them did not stop the practice, the Committee then made it penal to do so, but with that exception I have never known such a thing as a wager. Every £1,000 of stock which is sold on the Stock Exchange must be delivered *per se* or *per alium*. It must be delivered (whether demanded or not) and for this reason: If the buyer does not pass me a name on the name day, I sell it out through the secretary of the Stock Exchange for a name to complete the bargain. There is no such thing as a bargain left uncompleted. What I mean by *per se* or *per alium* is that if I have sold £1,000 stock to B, if I am not prepared to deliver it, I get D to deliver it to B on my account, and pay him for doing so. If B does not want it, he must find some body who does. There is no such thing as fiction in regard to any part of a Stock Exchange bargain."

Time-bargains.

It does not seem that a Time-bargain in the proper sense of the term, *i.e.*, a contract for the future delivery of something the amount or value of which cannot be ascertained, is in the nature of a wager. Thus, as put by BRAMWELL and COTTON, L.JJ.,[1] the sale of next year's apple crop would be a good contract. A contract for "differences" on the Stock Exchange, though sometimes called a time bargain, is not such according to BRAMWELL, L.J., in the ordinary sense of the word. So in *Marten* v. *Gibbon*[2] a question arose as to the validity of the sale of a prospective dividend. Defendant employed plaintiffs, who were stock-brokers, to sell for him the next dividend on £50,000 of South Eastern Railway A

Sale of prospective dividends.

[1] 4 Q. B. D., at p. 696. [2] 33 L. T., n.s., 561.

Deferred Stock, and plaintiffs sold it to a firm of dealers on the Stock Exchange. The dividends declared were in excess of the price at which the plaintiffs had sold them ; so plaintiffs requested defendant to authorise them to pay the difference to the dealer. On defendant's refusal plaintiffs paid the amount and sued defendant for indemnity.

It appeared that by Rule 61 of the Stock Exchange, the Committee did not recognise bargains in prospective dividends. There was no evidence as to whether the defendant was at the time of the contract in possession of the £50,000 of Stock.

It was argued for the defendant (1) That this was a transaction within 8 & 9 Vict., c. 109. (2) That as this was not a contract which the Stock Exchange would enforce, no authority to pay the difference could be implied, and there was no evidence of an express authority. (3) Defendant had revoked the plaintiff's authority to pay.

But the Court held (1) That it must be assumed, in the absence of evidence to the contrary, that the defendant had the £50,000 of Stock in his possession at the time of the contract. Therefore, although an agreement of this kind would have been within Barnard's Act, it was not within 8 & 9 Vict., c. 109, any more (as was put by BLACKBURN, J.) than the purchase from a fisherman for the next haul of his net at a fixed sum. Even if it were a wager as between the principal and the broker, it could not be assumed that the jobber knew that it was. (2) That the meaning of Rule 61 was, only that the Committee would not enforce such a contract by expulsion, but the contract was otherwise left good between the parties. The broker therefore, having at defendant's request entered into a contract on which he was personally liable, the defendant could not revoke plaintiff's authority.

Since this case was decided, the rule of the Stock Exchange (No. 61) on this subject has been changed into one of a prohibitive character, it being there provided " That no member shall enter into bargains in prospective dividends in shares

New rule.

or stock of railway or other companies." So that while this rule continues in force, no question is likely to arise as to the rights or liabilities of members of the Stock Exchange in bargains of this description.

Sale of dividends of stock not in possession.

The case, it will be seen, leaves quite unsettled what the result of a bargain for the sale of dividends of Stock *not* in vendor's possession. It is submitted that the result of such a bargain would be that the jury would, on the facts, find that such were only in the nature of a wager, and that the question would be left to them as one of fact.[1]

Options.

There is another kind of transaction on the Stock Exchange, as to which there may some day be a question how far it is a gaming contract within the statute. These are called "Options." Options are described by a witness giving evidence before the Stock Exchange Commission of 1878,[2] as the purchase of the right to buy or sell particular stock on a particular day at a fixed price, *e.g.*, the price of Russian Stock is 83 to-day, and a person wishes to acquire the right

Calls.

to buy that stock on some future day, believing that the price will then be higher, and is desirous of not risking more than a certain sum of money in the transaction, say 2 per cent. He would probably be obliged to give 85 for the stock for the end of March, upon the condition that if he did not wish to take up the stock, he must pay 2 per cent., the difference between the day's price and the price at which he bought: that is in effect paying 2 per cent. for the right of saying at the end of March whether he will or will not buy the stock at 83. If he does not buy he loses 2 per cent., and the stock must rise 3 per cent. by that time before he can make

Puts.

1 per cent. profit. Then there is the converse case of a put, which is payment of a premium for the right to sell, or call upon a man to take delivery of, so much stock at a fixed price. This is akin to a Bear transaction, and of course the option will only be exercised in the event of a fall in the

[1] This seems the result of the cases *Grizewood* v. *Blaine*, 11 C. B., 526; *Ex parte Marnham*, 30 L. J., Bkptcy., 3.

[2] See the Report of the Commissioners, p. 274, No. 6949.

price. The person who would accept this obligation would be an intending purchaser, who is willing to give a price equal to the price of the day, minus the premium. Suppose the price of stock be at 90, A is desirous of purchasing, but does not wish to give more than 88. B, believing they are about to fall, wishes to "bear" them without incurring the risk of heavy loss. So B gives A 2 per cent. for the right on a future day of calling on A to take delivery of so much, at the price of the day—90. If they fall to 87, B will exercise the option and make 1 per cent. profit, while A has got the stock virtually for £88, which he was willing to give. If B does not exercise the option, A secures his 2 per cent.

Double options.

There are also double options, which give the right of either buying or selling at a fixed time, that is to call it if it goes up, to put it if it goes down, for which a double premium is charged.

Are options in the nature of wagers.

It has been suggested that these transactions would be held void at law, as being in the nature of wagers. It was remarked by the Chairman of the Stock Exchange Commission, that they were very much in the nature of a "bet."[1] It will be remembered, moreover, that Barnard's Act places all agreements for "puts and refusals" in the same category as wager-contracts, which are all made illegal thereby. It is, however, submitted that in all bargains for options the great element of a wager is wanting. It does not seem to be the essence of the bargain, to use the words of COTTON, L.J., in *Thacker* v. *Hardy*, "that one party should win and the other should lose."

Suppose A gives B £2 for the option to buy of him so much stock at a future date, at, say £80, the market price of the day. The result to B must be the same in all cases. He secures his £2. So far as this transaction goes, it is immaterial to him whether the stock rises or falls in price; he will in neither case be a loser as between himself and A. Of course if the price rises, the only event in which A will

[1] See Report of 1878, at p. 29.

exercise the option, B may be called a loser in the sense that he might have sold his stock at the increased price instead of the price stipulated for; but this seems to be only an indirect loss, not a loss on the actual agreement with A. He is in no event called on to make a payment to A. He is only a loser in the sense as suggested by COTTON, L.J., in *Thacker* v. *Hardy*,[1] that any party to an ordinary contract of sale may be so described according as the bargain turns out in his favour or the reverse. No doubt, as stated by the witnesses before the Stock Exchange Commission, in many cases these options are purchased without the slightest intention on the purchaser's part of holding the stock; but still, as in the case of an ordinary sale of stock, it is impossible for the vendor to know what the purchaser's ultimate intentions are, which, according to cases cited above, takes the case out of the category of a wager.

Continuations.

There is a class of transaction very common upon the Stock Exchange called in general "Continuations," which, it seems, may be made a mere cover for wagering. But here the operation of the buyer and the seller must again be distinguished. Suppose a buyer has purchased, for the next account day, more stock than he can take up, he has to arrange for the bargain being continued or carried over to the next account day. If he be an outsider and not a member of the Stock Exchange, he must of course get it arranged through his broker. Application is then made to a dealer who has money to lend, and, perhaps, wants the stock. This dealer may be the same person as the original vendor, or he may not. In either case, the form of the transaction is a purchase of the stock (in the former case it will of course be a re-purchase) by the dealer; the price of this purchase or re-purchase is fixed by the clerk of the house, by the instructions of the committee, as the price at which the continuation is to be effected, and is called "the making up price." The stock is then, by a collateral agreement, re-purchased from the dealer at the same price, only with an addition as pre-

[1] 4 Q. B. D. at p. 696.

mium for the accommodation. This premium is called a "Contango;" and in cases where the bargain is arranged with the original vendor of the stock, it is simply the consideration for the vendor's agreeing to postpone delivery of the stock until the next account day; but where it is done with another dealer, it is in substance an advance of money on the security of the stock, and is called "taking in" by way of continuation. Contango.

Where the price has fallen so that the making-up price is less than the original price, the purchaser in effect pays the difference. Suppose A has bought £1,000 Railway Stock at par for the current account, when the settling day arrives he does not want to take it; he then agrees with his vendor to carry it over to the next account. Say the price has fallen to 98, and that is the making-up price. The jobber repurchases of him at 98 for the current account, thus leaving a difference of two per cent. payable by the original purchaser to the vendor, and this difference is payable on the current account day. By a collateral agreement, the jobber resells to him for the ensuing account at 98, plus the contango; so that in the result he pays the original price, viz., par, plus the contango as the price of the continuation. It comes to the same thing if the purchaser gets another jobber to "take in" the stock for him. He pays £100 to his vendor, receiving £98, the "making-up price," from the other jobber, which is in effect an immediate payment out of his pocket of two per cent. If, on the other hand, the price has risen two per cent., so that the making-up price is £102, he would receive £2 from his vendor on the current account day, but on the ensuing account he would have to pay £102, the making-up price, plus contango. Sometimes these continuations are effected over several accounts, the purchaser paying or receiving differences according as the price falls or rises. Such a transaction seems to amount simply to a loan of money on the security of stock, the amount of the loan being by the payment of the differences from time to time, kept just equal to the market price of the security.

"Taking in" distinguished from loans.

The "taking in" of stock by way of continuation must be distinguished from a mere loan or deposit of stock. In the former case it is, *pro tempore*, an absolute sale of the stock to the jobber—the property passes to him—he can deal with it as his own. He is, no doubt, obliged to deliver the same amount of stock on the ensuing account day, but not the identical stock. But in the case of a loan, he is not allowed to sell it or place it beyond his own control, but may be called upon to restore the identical securities. (*See* Rule 67.)

? Whether continuations ever in nature of a wager.

It seems that continuations are effected in the case of loans where the stock is merely lent or deposited as security, and not "taken in," as in the transaction described above, in which case, as has just been said, the stock is merely pledged, and the lender cannot part with the control of it. It would, of course, be quite possible that parties might enter into gaming transactions, or bargains for the payment of differences, under guise of an agreement for the continuation of a loan, the parties on either side paying or receiving a difference according to the rise or fall in price, as before described. The following cases will show by what test real and fictitious bargains are to be distinguished.

Case of loan fluctuating according to value of security.

In *ex parte Phillips*,[1] it appeared that it was an ordinary dealing for one member of the Stock Exchange to make advances of money on the security of shares, &c., belonging to the borrower, or on the deposit of certificates or other evidence of title, and that such deposits often amounted to the full value of the security; and that the lender was entitled, if the advance were not repaid on the day agreed upon, either to dispose of such security, or to retain it at the market price of the day, and either to claim the deficiency or repay the surplus. If the borrower were declared a defaulter and the securities were not realised within three days of such declaration, the lender must take them at a price to be named by the official assignee. In November, 1858, Phillips lent the bankrupt £775 at six per cent., on deposit of some securities, till the next settling day. The loan was renewed

[1] 30 L. J. Bkpcy., 1.

on several successive settling days upon the same terms, except that when the value of the securities fell, part of the loan was paid off: but as the value rose the lender made further advances, thus equalising from time to time the amount of the loan and the value of the security. On 30th April, 1859, a sum of £625 was in this way due to Phillips, but the bankrupt had two days previously been declared a defaulter, and the petitioner had retained the shares at the market price of the day, they having fallen in value. According to the custom of the Stock Exchange, it was optional on each settling day for either party to renew the loan, the amount being increased or diminished according to the then value of the security. In July the debtor was adjudicated bankrupt, and the petitioner tendered a proof for the amount due, as above. The commissioner rejected the proof, on the ground that the debt was due on a gambling transaction.

Difference between real and fictitious loan.

On appeal, this decision was reversed. TURNER, L.J., pointed out that it was not as though there was no real advance of money, and a payment by one side or the other according to the rise or fall of the stocks. Here there was a *bonâ fide* advance, and the creditor was, in any event, to receive the amount with interest, no more and no less.

Ex parte Marnham.

So in the contemporaneous case of *ex parte Marnham*,[1] there was an alleged sale of shares to the bankrupt at a certain price. The differences were paid on each settling day by the bankrupt to the petitioner, and by the petitioner to the bankrupt, as in Phillips' case, and the account was finally settled by the petitioner taking the shares at their value, leaving a balance in favour of the petitioner, for which he claimed to prove. There was no real delivery of the shares.

TURNER, L.J., said that if the case had rested there, it would have been necessary to have the case further investigated before a jury; but it appeared that the dividends on the shares were accounted for to the bankrupt, and, further, the petitioner repurchased some of the shares from the bankrupt and accounted to him for the value. The former

[1] 30 L. J. Bkpcy., 3.

fact, perhaps, would not have been inconsistent with a mere cover for the payment of differences; but the repurchase of the shares and payment for them, stamped the transaction with the character of reality.

Such are the criteria for testing the legality of such transactions; as cases have been before the Courts it is necessary to mention them. At the same time, we must not forget the positive statement of the witnesses before the Stock Exchange Commissioners that, in point of actual practice, there is no such thing as wagering or fiction in dealings on the Stock Exchange.[1]

Backwardation.

But, now, to take the converse case of the seller, who has sold more stock than he can deliver. He has to apply to a dealer who will advance him the stock. The operation here effected is, the purchase of the stock for the current account at the "making-up price," and its resale for the ensuing account. This resale may be at a lower price than the purchase, and the difference between the two prices being the premium paid to the dealer for the loan of the stock. It may, on the other hand, be effected at the same price, if the state of the market is such that the payment of the money is of itself an accommodation to the dealer sufficient to induce him to make the arrangements. The premium, if any, received by the lender of the stock is called a "Backwardation." But, as explained by a witness before the Stock Exchange Commissioners,[2] the payment of contango or backwardation depends upon whether the particular stock is overbought or oversold. If an enormous amount of stock is thrown upon the market more than it can take, there is a a heavy contango; if, on the contrary, an enormous amount of stock is taken off the market, there is no contango, but a backwardation.

It is submitted that the following conclusions result from the foregoing cases:—

[1] In *ex parte Turner*, 3 D. & G., 46, it was held that carrying over an account by continuation would bring a bankrupt within s. 201 of the Act of 1849, and be a bar to his obtaining his discharge.

[2] See Report, 1878, p. 23, Mr. Daniel's evidence.

(1.) Bargains for mere differences are wagers within 8 & 9 Vict., c. 109. though contracts on the Stock Exchange never take that form. Results of the foregoing cases.

(2.) That mere bargains for the future delivery of things not in possession and the value of which is uncertain at the time of the contract are not wagers.

(3.) That in determining whether a bargain be in the nature of a wager or not the substance of the agreement as understood by both parties at the time must be looked at.

(4.) That the question as to what were the real elements of the agreement is a question of fact for the jury, but that it is for the Court to decide on the nature of the agreement on the facts so found. Both these positions seem clear from the case of *Grizewood* v. *Blane* and the remarks of TURNER, L.J., in *ex parte Marnham*.

(5.) That the absence, in fact, of a material element of the professed transaction is material as showing that the bargain was a mere cover for a wager, *e.g.*, non-delivery of stocks or shares, as in *Grizewood* v. *Blane* and *ex parte Marnham*.

(6.) That, as between the jobber and the broker's principal, it is quite immaterial that the arrangement between broker and principal is for a wagering contract, unless the jobber is aware of it and so knowingly engages in a wagering transaction. This clearly appears from the remarks of the judges in *Thacker* v. *Hardy*[1] and *Marten* v. *Gibbons*.[2]

(7.) That where as between principal and jobber the contract be a wager, the contract between principal and broker to carry out the main contract is not one of wagering, but gives rise to an implied contract right of indemnity. This appears from *Thacker* v. *Hardy* and *ex parte Godefroi*.[3]

It is only necessary to mention very shortly a subsequent statutory provision with respect to gaming and wagering contracts.

By the Bankruptcy Act of 1849, section 201, it is enacted 12 & 13 Vict.

[1] 4 Q. B. D., 690. [2] 33 L. T., n. s., 561.
[3] 1870, W. N. C., 95. See also the cases quoted above as to the right of the agent to recover.

that no bankrupt should be entitled to his certificate of discharge who should have lost by any sort of gaming or wagering £20 in one day or £200 within twelve months previously; nor who should have lost within the preceding twelve months £200 by the purchase or sale of any stock where such stock should not be actually transferred or delivered in pursuance of the contract, or where the stock was not to be transferred within one week after the contract.

It will be observed that this enactment attaches penal consequences to two classes of transaction: wagering contracts and "speculations" on the Stock Exchange, using the term in its wider sense, and not merely as equivalent to bargains for differences. The principal points decided on this section were:[1]—

(1.) That speculations on the Stock Exchange (to which the phrase "time-bargains" was more than once applied by the judges) were not wagers within the first part of the section, as they were expressly dealt with in the latter part. It seems, however, to have been admitted that they were or might be wagers within 8 & 9 Vict., c. 109.

(2.) That stock (and ? shares) in railway companies was within the Act, which did not, like Barnard's Act, apply only to public stock. In *ex parte Wade* a question was raised as to whether Turkish scrip were within the Act, but the point was not decided. However, it appeared from the evidence of a stockbroker that scrip was not considered as equivalent to stock.

(3.) It would seem from the above cases that where the purchase was for an account-day more than a week distant, or where delivery was postponed on a "continuation," this would bring the bankrupt within the Act.[2]

(4.) The practice of the Court was, where any question of doubt arose, not to decide it, but to grant the certificate subject to its being avoided for the reasons given in the statute.

[1] *Ex parte Ryder*, 1 De G. & J., 317; *Ex parte Wade*, 8 D. M. & G. 241; *Ex parte Matheson*, 1 D. M. & G.

[2] *Ex parte Turner*, 3 D. & J., 46.

These provisions with respect to the discharge of bankrupts have not been repeated in subsequent Bankruptcy Acts; though under the new Act it is still discretionary with the Court whether the bankrupt shall have his discharge, regard being had to his conduct in all cases of rash speculation.[1]

It would seem, from the foregoing history of the legislation in respect of betting contracts, that the tendency of the Legislature has been to abstain from active interference with the subject's liberty, and to give negative discouragement to the practice, by observing a neutral attitude as between the parties, rather than to endeavour to stamp it out by penal enactments. Thus within the last half century three penal statutes on the subject have been repealed. The Act of 1845 repealed the penal provisions of the Statute of Anne. The penal provisions of the Bankruptcy Act of 1849 have not been renewed. Barnard's Act, which, it seems, had for a long time been a dead letter, was repealed in 1860. There is, however, one statute in a contrary direction, 30 & 31 Vict., c. 29, known as Leeman's Act, which enacts that all contracts for the sale or transfer of any shares, stock or other interest in any joint stock banking company in the United Kingdom of Great Britain and Ireland constituted or regulated by the provisions of any Act of Parliament, Royal Charter or letters patent, issuing shares or stock transferable by any deed or written instrument, shall be null and void to all intents and purposes whatsoever unless such contract, &c., shall set forth and designate in writing such shares, stock or interest by the respective numbers by which they are distinguished at the making of such contract, &c., on the register or books of such banking company as aforesaid, or, where there is no such register of stock, by distinguishing numbers, then unless such contract, &c., shall set forth the person or persons in whose name or names such shares, stock or interest shall at the time of such contract stand as the registered proprietor in the books of such banking company. It is further made a

Leeman's Act, 30 & 31 Vict., c. 29. History of legislation.

[1] See 46 & 47 Vict., c. 52, sec. 28 (3) *d*.

misdemeanour to insert in any contract a false entry of any such number or names.

Effect of Leeman's Act.

The purport and effect of this statute is obvious; it is intended to prevent speculative sales and purchases of bank shares, and to annul such transactions in cases where the vendor has not the shares in his possession at the time of the contract: in the same way as Barnard's Act prohibited the sale of public stocks not in the possession of the vendor. Leeman's Act, however, only makes the contract void, whereas Barnard's Act had made it illegal.

The circumstances which gave rise to the passing of the Act are well known. From 1864 to 1866 there was a large amount of speculation in bank shares, which caused great fluctuation in their prices, and led to serious consequences. From the evidence given by some of the witnesses before the Stock Exchange Committee of 1878, it would seem that the real origin of the panic is to be looked for, not in the "bear" or selling movement, but in the previous rush to buy, which was in some cases started by combinations of persons who were supplied with means by the directors of the banks. This "bull" movement produced the desired result of raising the prices of the shares above their real value. The shares then having reached a price which neither the dividends nor the internal condition of the banks justified, speculators took the opposite course; the "bear" operations which followed caused a rapid fall in prices. Not only shareholders, but depositors became alarmed, the sudden rush to withdraw deposits was more than some banks could meet; but those that did stop payment had long been hastening their own ruin by unsound internal management and investment in rotten securities. Others, whose condition was more stable, suffered a temporary depreciation in the value of their shares, but ultimately survived the panic. There were many reasons why banks and bank shares should be protected in future from such onslaughts and the disastrous results consequent thereon, so Leeman's Act was passed avoiding all contracts for the sale of shares which at the time of the contract

could not be specifically identified: contracts which the vendor could only perform by going and purchasing in the market himself.

Act not observed on the Stock Exchange.

In practice, however, the Act has on the Stock Exchange been a dead letter, owing to the impossibility of transacting business in the ordinary way if its provisions were observed. But a recent case shows that although as between members of the Stock Exchange it may be the practice to disregard the Act, yet such practice does not bind the outside public, and that if a broker, through not complying with the Act, fails to carry out his client's instructions, he may become liable in damages.

Liability of broker.

In *Neilson* v. *James*[1] the plaintiff employed the defendant to sell for him some shares in the West of England Bank in the Bristol Stock Exchange. The shares were not numbered, but registered in the name of their owner. Defendant sold them on the 4th of December to a firm of jobbers on the Bristol Stock Exchange, but the bought and sold notes which passed between the defendant and the jobbers on that date did not disclose the name of the owner of the shares. The 13th December was the "name day" (*i.e.* the day on which the jobbers were bound either to accept delivery of the shares themselves or furnish the name of a sub-purchaser to stand in their place,[2] and the jobbers then furnished the name of one J. R. Gould as the purchaser to take delivery, who thereupon became liable (under ordinary circumstances) to accept and pay for the shares. But previously to this date, on the 7th of December, the bank had stopped payment and soon after was wound up, and Gould repudiated his purchase on the ground that the name of the owner of the shares did not appear on the contract, which was therefore void under Leeman's Act. The consequence was that the plaintiff remained owner of the shares and lost the price he would have obtained if the sale had been validly carried out.

[1] 9 Q. B. D., 546.

[2] For the nature and incidents of this transaction, *vide Coles* v. *Bristowe*, L. R., 4 Ch. 3.

Plaintiff sued to recover the price of the shares as stated in the sold note.

For the defendant it was argued—(1) That the agreement of the 4th December was only incohate and not the completed contract, consequently there was no breach of duty on the defendant's part on that day. (2) That the real contract was not completed till the 13th, and then performance was impossible as the bank had then stopped payment and was in the course of winding up; at any rate the damages should be only nominal according to the value of the shares on the 13th. (3) That the defendant was employed by the plaintiff to effect the sale subject to the customs of the Bristol Stock Exchange; that one of those customs was to disregard the provisions of Leeman's Act in the sale of bank shares.

The Court decided—(1) That according to *Coles* v. *Bristowe*[1] the contract was complete on the 4th, subject only to the right of the jobbers to furnish the name of a sub-purchaser as a substitute for themselves on the "name day." (2) There is no undertaking on the part of the vendor of shares that the company shall be a going concern on the day of transfer; consequently, as plaintiff would have been entitled to the full price, that price must be the measure of damages. "It is said," remarked BRETT, L.J., "on the part of the defendant, that the plaintiff can only recover nominal damages, because if the contract had been in due form, the jobbers would not have been bound to have taken the shares, as the plaintiff could not on the account day, when the bank was being wound up, have given a valid transfer which the bank could have registered. But it seems to me that all the seller was required to do was to deliver shares on the account day, which, if the bank had remained solvent would have entitled the purchaser to have had them transferred into his name, and that the seller does not undertake that banking company shall be a going concern up to the account day. The plaintiff was therefore ready to do all that he was bound to do, and if the jobbers had accepted the shares on that day,

[1] L. R., 4 Ch. 3.

they would have have been bound to have paid the agreed price; and as the defendant failed to do that which would have compelled them to have taken the shares, the plaintiff lost such price by reason of such failure." (3) That the custom was bad as being unreasonable and illegal. Per BRETT, L.J.: "He does not say the plaintiff knew of the custom, but he says that because plaintiff employed him to sell the shares on that Stock Exchange and according to its rules, he is bound by that custom. I think, however, that the plaintiff is only bound by such a custom as is both reasonable and legal, for to that extent only can a person who is ignorant of a custom be assumed to acquiesce in and be bound by it."

N.B.—These remarks seem to assume that if plaintiff had known and acquiesced in the custom he could not have been heard to say the custom was unreasonable. This would probably have been the case if the defendant had previously done similar transactions for plaintiff without his taking any objection.

So the broker was held liable to his client for negligence, in not conforming to the requirements of the statute, and thereby depriving his client of the benefit of the sale of his shares.

It will be seen that the law as it stands is somewhat in favour of an unscrupulous purchaser. The Act having made the contracts void, and not illegal or punishable, there is nothing to prevent members of the Stock Exchange from disregarding it, except a possible liability to a client; while, on the other hand, the inconvenience entailed by complying with the Act is sufficient to induce dealers and brokers to incur whatever risk there may be, so as to facilitate business. It is probably only a member of the outside public that would ever take advantage of the Act, and repudiate a bargain on the ground of non-compliance with it provisions. Besides, there can be no doubt it affords a safeguard to banks against undue fluctuation in the price of their shares.

From a late case before the Court of Appeal, it seems that in the case of the purchase of bank shares through

a broker, if the principal have notice (*e.g.* by the receipt of the bought note) that the contract effected by the broker does not comply with Leeman's Act, and if he does not repudiate it, the broker will be justified in paying the purchase money on his principal's behalf.

Barclay v. *Pearce.*

At least this seems to be the effect of the case of *Barclay* v. *Pearce*[1]. Defendant instructed plaintiff who was a stock-broker, to purchase shares in the Oriental Bank. The usual bought note was sent to the defendant, but neither this nor the contract with the jobber contained the numbers of the shares purchased, nor the name of the registered owner, as required by the Act. The "name day" was the 2 4th, on which day the name of the defendant as the purchaser was handed to the jobber. The transfer was duly executed.

By the rules of the Stock Exchange the plaintiff was personally responsible to the jobber for the payment of the purchase-money. It is customary in dealings in bank shares to disregard Leeman's Act. The plaintiff paid the purchase-money and sued to recover from defendant. There was no proof that defendant had revoked the plaintiff's authority to pay. The Court held that the plaintiff having at defendant's request entered into a contract on which he was personally responsible, though it was void at law, was entitled to recover for money paid to defendant's use. It was also intimated that until *Read* v. *Anderson* was reversed by the House of Lords, it would be immaterial whether the authority to pay had been revoked or not.

It is, however, submitted that it would have been competent for the defendant to have repudiated the transaction when he discovered that the statute had not been complied with, and that in that case the plaintiff's authority would have been revoked. According to *Neilson* v. *James*, the usage of the Stock Exchange to disregard the Act would not bind the principal, at any rate unless he acquiesced in it. The distinction between this case and *Read* v. *Anderson* seems to be that in the latter case the agent was employed to carry out

[1] Not yet reported except in the newspapers August 11th, 1884.

a contract necessarily void as being a wager. In this case the contract might have been carried out so as to be legally binding, and there would probably be no presumption that the instructions were to make other than a legal agreement.

Review of the law of wager-contracts.

The present seems a favourable opportunity for a short review of the state of our law on the subject of wagering.

There are several ways in which the matter may be treated by the Legislature. It may declare the practice illegal in the sense of punishable, and endeavour to stamp it out by the machinery of the criminal law This was the course adopted by the Statute of Anne, which made it penal to win more than £10 at one time or sitting by betting or gaming. Again, Barnard's Act made it a criminal act to gamble in the funds, or even to settle differences on transactions of that nature. This species of legislation seems open to objection. Such a law must be uncertain in operation, as the offence is difficult to prove; and what is, perhaps, worse, it is still more difficult to disprove, and so capable of being turned into an instrument of extortion or revenge. But there are alternatives of a less violent character. It is possible to make wagering transactions illegal, not in the sense of criminal, but as contrary to public policy; the result of which would be, as it has been endeavoured to explain in an earlier part of this work, not only that the contracts themselves would be unenforceable, but that they would vitiate, at any rate as between the parties to the wager, every instrument or security, whether under seal or not; they would taint every contract or transaction arising out of or connected with the original wager. Thus the turf commission agent would not be able to recover what he had paid on his principal's behalf if he allowed himself to be employed in a transaction contrary to the policy of the law.

In the Statute of Anne, and in Barnard's Act, another means was resorted to of restricting the practice, viz., they gave the person who had lost and paid over a certain sum, a right of action to recover it within a given period. This might be a more efficacious method of repression than any

other, as it is difficult to see how book-makers could conduct a successful business if, in addition to the chances of never being paid, they could not call the money they had in their pockets their own. But the wisdom of such a species of legislation seems very questionable; it is no part of the business of the law to encourage unscrupulous dealing even in transactions of which it disapproves, and being in favour of dishonest persons it eventually operates to the disadvantage of persons who are ready to discharge their debts of honour. Besides, it hits the practice of betting in its least objectionable point. The payment of a bet implies that a man has not "plunged" beyond his means, particularly where the contract cannot be enforced against him. The object of the law is to discourage excessive gaming on credit, whereby persons might incur liabilities which their means can never enable them to meet.

There is yet another alternative course, which is summed up in the attitude which our law, in its present condition, assumes towards betting. In technical language, it declares wager-contracts void without making them illegal; it regards them as things not to be encouraged, but not absolutely forbidden, maintaining a neutral position as between the parties without being positively hostile. It will probably have become evident from the foregoing pages, that the English law on the subject is in a somewhat peculiar state. In the first place its condition is decidedly piecemeal. To know the law in full it is necessary to refer to four different statutes, the dates of which, from first to last, extend over a period of about two hundred years. The Statutes of Charles II. and Anne must be studied before the effect and meaning of the Statute of William IV. can be made intelligible. But the latter statute, at any rate in its present application, deals only with cheques and securities given for betting debts, and that, too, only where the bet is made on a horse-race, or some other game or pastime. Such securities it declares to be given for an illegal consideration. The contracts themselves are the subject matter of another statute passed a few years after-

wards, which by a broad and sweeping enactment, very little in the style of English statute law, makes all wagers, of any sort whatever, not illegal, but void and unenforceable. It seems an anomaly that while all bets of themselves are simply void, yet when once a cheque is given in discharge or payment thereof, we are compelled to distinguish between bets on games, and bets not on games; the former, directly the cheque is signed, becomes illegal, while a similar transformation is not effected in the case of the latter. The law at any rate seems capable of greater uniformity in this respect.

Another peculiarity of the law lies in this—that while wagers themselves cannot be made the subject of an action, yet in many cases they can be practically enforced by the joint exercise of legal and non-legal sanctions. This is specially the case with regard to betting on the turf, a large quantity of which is carried on, not directly between principals, but through the medium of betting agents. The agent makes the bet in his own name, and, so far as the other party is concerned, is the principal. If the bet is lost, the agent is of course under no legal obligation to pay. But these turf agents are members of what may be called a profession, and the dealings between the members are regulated by the strictest etiquette, a breach of which might entail serious consequences. It is well known that where an agent makes a bet, it is he who, by the rules of the turf, is responsible for payment. Some of the consequences of default were dwelt upon in the case of *Read* v. *Anderson;* but suffice it to say that a defaulter is practically turned out of his profession. So that payment is enforced against the agent just as effectually as it could be made the ground of an action at law. He must, if he can, obtain indemnity from his principal.

It is at this stage that the law steps in. When an agent has paid money on behalf of his principal, the law gives the agent a right of indemnity. If the agent has been employed in a betting transaction, this right, says the law, arises not out of a wager but out of an implied promise

by the principal to save the agent harmless from all the consequences of his performing his instructions. The principal knows that if the bet is lost the agent must pay; consequently the doctrine of an implied promise of indemnity applies equally where the transaction effected by the agent was void as being in the nature of a wager. So eventually, a transaction which, as between principals, the law would not recognise, is practically enforced by a circuitous process when effected through the medium of an agent.

But the inconsistency is seeming rather than real. The contract between the principal and the agent is not in the nature of a wager. It is more in the nature of a contract of loan. A promise by A that he will make B a present of £5 gives B no ground of action against A; it is simply void. But A employs C to go and pay the money on his behalf. C can, of course, recover what he has paid, from A. So a wager is nothing more than void, like the promise of a gift; it is not illegal. And this is the real explanation of the matter. The law does not forbid people to bet, so that in compelling the principal to indemnify his agent it is not enforcing any transaction contrary to its own policy.

Further, be it remembered, the law in its present state is not open to the charge of one-sidedness: the rights of the principal and the agent are reciprocal. The agent has the same hold over the book-maker that the latter has over him; he could visit him with the ordinary penalties of default. But the agent who has received "winnings" on a bet, can no more refuse to account to his principal, than can a principal refuse to reimburse the agent who has paid losses. So eventually, in cases where the commission agent intervenes, fair dealing is enforced as between all parties. It is also worthy of consideration that actions in which betting transactions are involved, but which come before the Courts on a question as between principal and agent, are not open to the same objection, as the actions which were allowed to be brought directly on the wager itself, and which necessitated

the trial of absurd and frivolous issues. The interposition of an agent occurs of course, almost exclusively in betting on the turf; and it may be taken that actions between principal and agent with respect to wagers, will in all cases be concerned with wagers on horse-races.[1] But in all such races there is a regularly established process for deciding as to the winner, and it is not likely that a man who was sued by a turf commission agent for reimbursements would be allowed to raise any question as to the correctness of the decision of the judge or the stewards of the race. In these cases, therefore, the time of the courts is never taken up with disputes as to the event on which the bet was made —an inconvenience which in former times drove the judges to the extreme measure of putting all wager actions at the bottom of the cause list.

Of course it must not be forgotten that the law as settled in *Read* v. *Anderson*, is yet subject to reversal by the House of Lords, a contingency which would materially affect the interests of turf commission agents; but so long as the decision of the Court of Appeal remains undisturbed, the law is that the agent who has made a bet in his own name has an irrevocable authority to pay the bet, if lost, on his principal's behalf; and can recover the amount from him.

[1] For reasons given above, it does not seem likely that questions of this sort will arise in Stock Exchange transactions.

CHAPTER III.

LOTTERIES.

A LOTTERY has been defined to be "a distribution of prizes by lot or chance," a definition which was accepted as correct by the Court in *Taylor* v. *Smetten*.[1]

The setting up of lotteries has been declared illegal and penal by a long series of statutes commencing in the reign of William III. The full text of these statutes will be found in Chitty's Statutes (title "Gaming"). It will be sufficient to summarise them for the purpose of the present work.

10 & 11 Wm. III., c. 17.

The Statute 10 & 11 William III., c. 17, reciting that persons had of late fraudulently obtained great sums of money from the children and servants of merchants and traders by colour of patents or grants under the Great Seal,

Lotteries declared nuisances.

enacts by section 1 that all such lotteries are common and public nuisances and all patents and licences for the same void.

Penalty of £500 for keeping lottery.

(2.) That no person should after the 29th of December, 1699, publicly or privately exercise, keep open, show or expose to be played at, drawn at or thrown at, any kind of lottery by dice, lots, cards, balls, under penalty of £500.

£20 for playing at such lotteries.

(3.) All persons playing, throwing or drawing at such lotteries to be liable to a penalty of £20.

9 Geo. I., c. 19. Foreign lotteries.

By 9 George I., c. 19, a penalty of £200 is inflicted for setting up any lottery by virtue of a grant from any foreign prince or issuing any advertisement for the same; also for selling tickets within the kingdom for any foreign lottery.

It seems that the latter statute was evaded by persons

[1] 11 Q. B. D., at p. 210.

issuing tickets for numbers in foreign lotteries and setting up duplicates of such lotteries in this kingdom. So by 6 George II., c. 35, a penalty of £200 is imposed for selling or procuring any ticket receipt, chance, or number in any foreign lottery, or in or belonging to any class, part, or division of such lottery, or any ticket for any duplicate of any foreign lottery.

6 Geo. II., c. 35. £200 penalty for selling chances in foreign lotteries.

12 George II., c. 28, inflicts a penalty of £200 for setting up any office or place under the denomination of "a sale of houses, land, advowson, presentations, plate jewels, ships' goods or other things by way of lottery" or for advertising for advances of sums of money amounting in the whole to large sums to be divided among the subscribers by chances of the prizes in some lottery allowed by Act of Parliament, or for exposing for sale any of the above things by any game, method or device, whatsoever to be determined by any lot or drawing.

12 Geo. II., c. 28. £200 penalty for setting up sales by lotteries.

Advertising for advances to be distributed by way of lottery.

By section 2 the games of ace of hearts, pharaoh, bassett and hazard are declared to be games or lotteries within the meaning of the Act, with the same penalties for setting up the same.

By section 3 players or adventurers in any of the games mentioned in the Act, viz., ace of hearts, pharaoh, bassett and hazard, are liable to a penalty of £20; the same penalty is inflicted on persons taking part in any such lottery or sale.

Sec. 3. Persons playing at games mentioned in the Act liable to £20 penalty.

Section 4 makes all sales by lotteries void, and the subject matter of the lottery is forfeited to the person who shall sue for the same.

All sales by lotteries declared void.

Section 11 provides that it shall be lawful for joint-tenants and tenants in common to make partition of their several interests by lot as though the Act had not been passed.[1]

Division among joint tenants by lot lawful.

By 42 George III., c. 119, section 1, all games or lotteries called "Littlegoes" are declared to be public nuisances.

42 Geo. III., c. 119, Littlegoes declared to be lotteries.

By section 2 any person keeping any office or place to exercise, show or expose, to be drawn or thrown at by dice, lots,

Penalty £500 for keeping a lottery.

[1] See *O'Connor* v. *Bradshaw*, 5 Ex. 882; *Fisher* v. *Bridges*, 3 E. & B., 642.

cards, balls, numbers or figures, or any other contrivance, any lottery called a littlego or any other lottery, or any person suffering the same to be carried on, is made liable to a penalty of £500.

Section 4. Persons employing others in carrying on such lotteries to be deemed rogues and vagabonds.

Section 5. No person is to agree to pay money or to deliver goods on any event or contingency relative to the drawing of any tickets, lots or numbers in any such lottery under penalty of £100.

Place.

By 4 George IV., c. 60, s. 60, the word "place" is declared to extend to any place in or out of an enclosed building, whether on land or water.

46 Geo. III., c. 148, all proceedings to be taken in the Attorney-General's name.

By 46 George III., c. 148, it is provided that all penalties under the former Act are to go to the Crown and to be sued for only in the Attorney-General's name.[1]

6 & 7 Wm. IV., c. 66. £50 penalty for advertising any lottery or ticket.

By 6 & 7 William IV., c. 66, a penalty of £50 is imposed on any person who prints or publishes any advertisement or other notice relating to the drawing of any foreign or other lottery not authorised by Act of Parliament, half the penalty to go to the informer, half to the Crown. The same penalty is imposed for printing advertisements of the sale of tickets or chances in any lottery.

8 & 9 Wm. IV., c. 74. Penalties to go to Crown.

By 8 & 9 William IV., c. 74, to save newspaper proprietors the annoyance of being sued for inadvertently advertising lotteries contrary to the Act, it is enacted that all penalties shall go to the Crown, and proceedings only instituted in the Attorney-General's name.

Indian law.

By the Indian Penal Code, 294A, it is made an offence to keep any "office or place" for drawing any lottery not authorised by Government, also to publish any proposal to pay money or deliver goods on an event to be determined by drawing, &c.

The English cases will in most cases be applicable to the construction of the term "lottery" in the Indian law. And

[1] See *Taylor* v. *Smetten*, 11 Q. B. D., p. 210.

as to what constitutes "a place" reference should be made to a subsequent part of this work on betting houses.

The following cases show what will constitute a lottery within the meaning of the Acts. What amounts to a lottery.

In *Allport* v. *Nutt*[1] plaintiff sued for £100, having subscribed £1 to an adventure on the terms that a certain race being about to be run, the name of each of the horses entered for the running should be put on a separate card, and that all should be mixed up in a box; and the same with the names of the subscribers, which were put into another box; that one card should be drawn out of the horse box, and then one card out of the other. The person whose name should be drawn out after the horse which should afterwards win the race, should win £100. Defendant pleaded that the transaction amounted to a lottery, or, in the alternative, to a wager under the Statute of Anne. In answer to this, plaintiff urged that the Lottery Acts only contemplated cases where unfair advantage was taken, relying for this argument on the recitals contained in the Statute of William III. *Allport* v. *Nutt*. Sweepstakes.

It was further argued that this transaction was a sweepstake, and not a lottery. "The difference" (argued Sergeant Byles) "between a lottery and a sweepstakes is this: in a lottery, the party getting it up receives from the purchasers of tickets more than the value of the prizes; whereas in a sweepstakes all the money obtained from the subscribers is paid over to the winners; the party to whom the subscriptions are paid is a mere stakeholder." Suggested distinction between lotteries and sweepstakes.

It was also contended that a lottery to be determined by the event of a legal horse-race, was not prohibited; that "all the Lottery Acts contemplate a scheme whereby the actor is attempting to enrich himself at the expense of the community. The transaction in this case is nothing more than betting on a legal horse-race, no single individual staking more than £1.[2] But the Court overruled all these arguments. The Argument that lotteries for legal horse-race not illegal.

[1] 1 C. B., 974.

[2] The learned Serjeant is evidently using the point decided in *Applegarth* v. *Colley*—that the statute of Anne contemplated a case where a single person lost £10.

words "all other lotteries," and "any other lottery whatsoever," used in the statutes, were wide enough to take in the present case, thus embracing what are commonly known as sweepstakes. "The mischief," says CRESSWELL, J., "intended to be remedied is, the introduction of a spirit of speculation and gambling, tending to the ruin and impoverishment of families, and not, as suggested, the gain acquired by the individual. Suppose a horse were sold by tickets amounting in the aggregate to the true value, would not that be a lottery?"

Gatty v. *Field*.

This case was followed in *Gatty* v. *Field*,[1] where sums of 15s. were deposited by subscribers with a secretary previous to a horse-race. The name of each horse entered for the running was put on a separate card; these cards were mixed up in a box; the names of the subscribers were then written on other cards, and mixed up in another box. Cards were drawn alternately out of the horse box and out of the other box, just in the same way as in *Allport* v. *Nutt*; the winner being also determined in the same way. *Held* that this was illegal as a lottery.

Distribution of presents at entertainment.

In *Morris* v. *Blackman*,[2] an attempt was made to evade the law by setting up a lottery under the guise of distributing presents gratuitously and capriciously among the audience. Defendant kept a shop in the King's Road, Brighton; in the window of which watches, pieces of plate, and other articles were exhibited, with a placard: "These presents, with others, will be given away by W. Morris, at the conclusion of his entertainment at N. Rooms, Brighton, to-night and every evening during the week." There was also a notice that tickets could be had within. A witness purchased of Jeffs, Morris' assistant, who was a co-defendant, a ticket for a seat, and received a programme, in which it was stated, "at the conclusion of the entertainment Mr. Morris will distribute amongst his audience a shower of gold and silver treasure on a scale without parallel; besides a shower of smaller presents, which will be impartially divided amongst

[1] 9 Q. B., 431. [2] 2 H. & C., 912.

the audience, and given away." At the close of the entertainment, a quantity of these "presents" were placed on a table. Morris took up a butter-cooler, and awarded it to the occupier of seat 345. Other "presents" were distributed in the same way, the number of a seat being sometimes called out which had no occupier.

Held that as a question of fact the magistrates had rightly decided that this was a mere contrivance to conceal what was really a game or lottery within 42 George III., c. 119. Per POLLOCK, C.B.: "I have no doubt that not one of the audience had the least notion that the proprietor was to give the articles to any person he pleased; but that every one thought he had a chance of winning."

Companies distributing benefits by lot.

In some of the cases, it has been sought to impeach the schemes of companies which contemplate the distribution of dividends or other benefits by lot.

Thus in *O'Connor* v. *Bradshaw*,[1] the objects of the Company were to raise subscriptions in small sums, to purchase land, erect dwellings thereon and allot them to its members on such terms as should enable them to become freeholders and obtain other privileges according to the number of shares for which they subscribed. Their right to obtain these privileges was not absolute but depended on the result of a ballot according to which a small number only of the subscribers could obtain present possession of houses, &c., and the proportion of those who had obtained them during five years was very small.

The Lord Chief Baron was of opinion that this scheme constituted a lottery.

Baron PARKE was of another opinion, thinking that the case came within section 11 of 12 George II., c. 28. He also put another illustration: "Suppose a number of persons were to buy a large collection of pictures some of which far exceeded others in value, might it not be decided by lot who should have the first choice?" But as the Company was illegal on another ground, this point was not decided.

[1] 5 Ex., 882.

Sykes v. Beadon.

The next case of this kind is *Sykes* v. *Beadon*[1] The Association was formed on the principle of investing the subscriptions of the members and dividing the capital fund and profits among themselves by means of certificates convertible by annual drawings by lot into preference dividend bonds bearing interest with a bonus.

Building societies distinguished.

The Master of the Rolls without deciding the point finally, said (p. 185) "I have grave doubts whether this Association is not illegal, as being within the Lottery Acts. Building societies are in a different position—they are loan societies. In an association such as this, it is not a case of loans to be returned, but of subscriptions to be divided. The subscriptions are to be divided among the subscribers by drawings by lot, and the prize is a bond with a bonus." (At p. 190.) "The holders of certificates are persons who subscribe money to be invested in funds which are to be divided among them by lot and divided unequally. That is the persons who get the benefit of the drawings get a bond bearing interest and a bonus which gives them different advantages from the persons whose certificates are not drawn, and it depends upon chance which gets the lesser or the greater advantage. It is, therefore, a subscription by a number of persons to a fund for the purpose of dividing that fund between them by chance and unequally.

"If that is not a lottery it is very difficult, at all events to my mind, to understand what a lottery is. It is called a division by lot, which means lottery. It says that the selections of certificates shall be by lot, and that is to be done in the ordinary way, by chance, and the benefits, as I said before, are unequal."

Wallingford v. Mutual Society.

The next company which it was sought to bring within the Lottery Acts was the Mutual Society—a sort of building society. The objects of this society were to accumulate capital by means of monthly subscriptions from members to advance capital to the members in rotation, to secure payment of such advances, and to divide profits among the

[1] 11 Ch. Div., 170.

members. The mode of operation was to obtain subscriptions from members, to advance them money, at interest upon certificates of appropriation. Such certificates should be given to every member on joining the society, and should certify his right to receive advances and a share of profits. Holders of life certificates were entitled to Tontine bonuses. An "appropriation" or advance was to be made according to the number of certificates held by the member successful in obtaining the appropriation.

Appropriations were to be allotted in two ways, the first and every fourth one thereafter by drawing, free of any premium or interest, while those intermediate appropriations shall be allotted to the member or members tendering the highest premium for the same respectively. Appropriations were to be repaid by quarterly instalments.

It was urged that the constitution of this society was illegal under the Lottery Acts as the benefits of the society were to be given to the members by drawings.

The Court were unanimous in holding that the society was not within the Lottery Acts. Per Lord SELBORNE: "One of those Acts plainly, on the face of its recitals (the enacting part not departing from the recitals) had reference to gambling transactions only; and in my judgment this was not a gambling transaction within the meaning of that Act." The other had reference to persons who kept lottery offices at which the public were invited to pay for lottery tickets; and that Act could have no application to this case.

Per Lord HATHERLEY: "If this were held to be a lottery nearly every building society and a great many other societies framed upon a similar footing might be found to fall within the enactments against lotteries."

Conflict between the two cases.

It does not seem easy to reconcile the dicta of the Master of the Rolls with the decision of the House of Lords in the above case. It is true the Master of the Rolls draws the distinction in the case of building societies that in them it is a case of loans to be returned and not of subscriptions to be divided. At the same time in both the cases seem to stand on this common

ground—that certain unequal benefits of the society were to be distributed by lot or chance. But according to the view of Lord SELBORNE, the Acts do not apply, except (1) where the transaction is of a gambling character, (2) where a person keeps an office for the sale to the public of lottery tickets, tests which do not seem applicable to societies which determine the rights of their members by the drawing of lots.

No defence that all present get some benefit.

In two cases it was contended that no scheme could amount to a lottery in which the holders of the tickets all get some value for their money, the amount or value being uncertain; but in both it was held that the element of uncertainty was sufficient to bring them with the Acts.

R. v. *Harris.*

In *Reg* v. *Harris*[1] defendant announced a bazaar to be conducted according to the principles of the Art Union. 5,000 tickets of 1s. each were to be sold; bonuses to the amount of £250 were to be distributed by lot. Every holder of a ticket got some bonus, but some bonuses were more valuable than others. Held by M. SMITH, J., that the fact that every body got some bonus did not make it the less a lottery.

Taylor v. *Smetten.*

So in *Taylor* v. *Smetten.*[2] Defendant erected a tent in which he sold packets containing 1 lb. of tea each. In each packet was a coupon entitling the purchaser to a prize, and this was publicly stated by the defendant before the sale. The purchasers were told to come next morning for their prizes, the nature of which were unknown till then. It is not stated in the report whether the prizes were drawn by lot, or whether they were awarded at the caprice of defendant. *Held* that this constituted a lottery. HAWKINS, J., says: "If the coupon alone sealed up had been offered for sale, the purchaser taking his chance whether it represented a pen or a silver pencil case, or if a number written on a slip of paper were sold entitling the purchaser to some article the name of which was written against a corresponding number in an undisclosed list, could any one doubt these would have been lotteries? To use it is utterly immaterial whether a specific article was or was not conjoined with the chance.

[1] 10 Cox, C. C., 352. [2] 11 Q.B.D., 206.

Bazaars.

The question never seems to have been raised whether bazaars conducted on the now somewhat common system of selling things by drawing of lots do not infringe the Lottery Acts. Such bazaars are usually held for the purpose of raising money for a charity. The method of operation in many cases is for a certain number of subscribers to pay down a specified sum of money each, and then articles of a different value are distributed among those subscribers, by drawing of lots, some of the articles being of greater value than others, every subscriber getting something for his ticket. It is clear from the authorities above quoted, that the latter circumstance does not take the case out of the Lottery Acts. So also articles are sold at these bazaars by raffle, or by a more modern institution called a "fish pond," in which a quantity of articles of unequal value, and all under cover, are placed together; and the subscribers, with a sort of fishing rod and line and a hook attached at the end, endeavour to fish up some article, the value of which of course is uncertain until taken out of its cover. It seems difficult to avoid the conclusion that if such bazaars are conducted on any of the systems above alluded to they infringe the provisions of 12 George II., c. 28, section 1., which prohibits the sale or exposing for sale of goods, &c., by any method or device to be determined by lot or drawing, thus prohibiting any lottery being carried on under the guise of a sale. Section 3 of the same Act seems to apply to any person buying at any such sales—it inflicts a penalty of £20 on any adventurer in the games forbidden by the Act, and on any person taking part in such lottery or sale. Whether it would be wise or tolerable that the law should be enforced in every case in all its strictness is another question, but it would be wise for persons who get up these bazaars, even with the most charitable motives, and ladies who take stalls therein, to consider the Lottery Acts.

"Fish ponds."

Lotteries illegal, not merely void as agreements.

Of course as the statutes have imposed penalties for setting up lotteries it follows that an agreement which has for its object any transaction which amounts to a lottery or of

which such transaction forms any part is tainted with illegality.

Results of illegality.

The chief results of a contract being illegal have been noted above in treating of bills and securities given for an illegal consideration. In some few cases the application of these rules to lottery transactions is illustrated.

Whole transaction tainted.

In *Fisher* v. *Bridges*[1] defendant agreed to sell to plaintiff a piece of land at a certain price, for the purpose, as plaintiff well knew, that the land should be exposed for sale by lottery contrary to the statute[2]. Defendant having paid only a part of the purchase money after the sale was over, entered into a covenant with plaintiff to pay the balance. The defendant pleaded that the deed was given for an illegal consideration, viz.: the sale by lottery.

The Court of Queen's Bench held that as the deed was made after the illegal transaction was over and did not appear by the plea to have been entered into in pursuance of the previous illegal agreement, it was not affected with the illegality; the grounds of their decision being that the purchase money and the sum secured by the bond were not necessarily identified.

But the Court of Exchequer Chamber reversed this judgment on the ground that "the covenant was given to secure the payment of a part of the purchase or consideration money for the lands the subject of the agreement, and no action could have been brought to recover the purchase money of the lands. The covenant springs from, and is a creation of, the illegal agreement; and as the law would not enforce the original illegal contract, so neither will it allow the parties to enforce a security for the purchase money, which by the original bargain was tainted with illegality.

Money deposited in a lottery can be recovered.

Another consequence of lotteries being illegal is that any person who has deposited money to abide the result of a lottery can, before the money is handed over to the winner, recover it back from the person with whom it was deposited.

The general principle is stated by STEPHEN, J., in *Wilson*

[1] 3 E. & B., 642. [2] 12 Geo. II., c. 28., 1.

v. *Strugnell*[1] that where money has been actually paid upon an immoral or illegal consideration fully executed and carried out, it cannot be recovered by the person who paid it; but where money has been paid to a person in order to affect an illegal purpose with it, the person making the payment may recover the money back before the purpose is effected. So in *Gatty* v. *Field*[2] where the plaintiff had deposited 15s. as subscriber to a lottery and sued the stakeholder as winner. It was held that to entitle him to recover his own subscription it was necessary for him previously to demand it back from the stakeholder and so put an end to the illegal transaction.

Demand necessary.

It seems in a lottery to be the same as in the case of a wager, a depositor cannot sue the stakeholder without previously giving notice to him that his authority to pay the money over to the winner is determined[3].

It is also clear both upon principle and on the authority of *Allport* v. *Nutt*[4] that no action will lie to recover money alleged to be due as the winnings of a lottery. The case of *Sykes* v. *Beadon*[5] has already been alluded to in another part of this work, where the Master of the Rolls held a society to be illegal partly as infringing the Companies Acts and partly as infringing the Lottery Acts. It will be remembered that his lordship distinctly opposed the dicta of Lord COTTENHAM in *Sharp* v. *Taylor*[6] to the effect that a suit could be maintained by a member of a firm formed for an illegal object for an account of profits realised by such illegal business on the ground that the Courts by affording such remedy in no way facilitated the illegal object, which had already been accomplished. The Master of the Rolls thought it made no difference that the illegal transaction was closed. "It is no part of the duty of a Court of Justice to aid either in carrying out an illegal contract, or in dividing the proceeds arising from an illegal contract."

Illegal partnership or society.

On the other hand it will be remembered that in *Beeston*

[1] 7 Q. B. D., at p. 551.
[2] 9 Q. B., 431.
[3] See *Savage* v. *Madder*, 36 L. J. Ex., 178.
[4] 1 C. B., 974.
[5] *Vide sup.*, pp. 23 & 114.
[6] 1 B. & P., 3.

v. *Beeston*[1] the principle of *Sharp* v. *Taylor* was distinctly upheld, so that for the present the authorities must be considered as conflicting.

Proceedings in lottery cases.

There are three different ways in which offenders against the Lottery Acts can be proceeded against:—

Indictment for a nuisance.

(1.) By indictment for a nuisance, the keeping of lotteries being declared to be a nuisance both by the Statutes of William IV. and 42 Geo. III., c. 119.

In *Reg.* v. *Crawshaw*[2] defendant was indicted under 10 & 11 William III., c. 17, section 1, and also under 42 Geo. III., c. 119, section 1, for a common nuisance in keeping a house lottery called a little-go. The evidence showed that the defendant advertised drawings and sold tickets for a lottery, in respect of which prizes were drawn and awarded to the winners. It was argued for the defendant that an indictment for a nuisance under section 1 of the Act would not lie, because by section 2 of both Acts, a specific penalty had been prescribed for setting up lotteries after the dates mentioned therein, whereby the remedy for a nuisance had been abrogated. But the Court held on the authority of *Reg.* v. *Gregory*[3] that whenever Parliament has declared an Act to be a nuisance, the party may be indicted, and that this form of proceeding had not been abrogated by the provisions in section 2 of each of the Acts.

Penalty of £500. Jurisdiction of justices taken away.

(2.) By section 2 of 42 George III., a penalty of £500 is imposed for keeping any office or place to exercise any kind of lottery.

By statute 27 George III., c. 1, the jurisdiction of justices of the peace in the matter of lotteries was curtailed, but in the case of *Reg.* v. *Liston*,[4] it was held that their jurisdiction was only taken away in the case of State lotteries.

But in *Reg.* v. *Tuddenham*,[5] it was held that whatever may have been the effect of 27 George III., c. 1, on which *Reg.* v. *Liston* was decided, at any rate, since 46 George III., c. 48.

[1] 1 Ex. Div., 13.
[2] Bell, C. C.
[3] 5 B. & A., 555.
[4] 5 T. R., 338.
[5] 9 Dowl, 937.

c. 48, s. 59, all proceedings for the recovery of penalties under 42 George III., c. 119, must be taken in the name of the Attorney-General and not before magistrates, whether in the case of a State lottery or otherwise.

Newspaper proprietors.

By 8 & 9 William IV., c. 74, all proceedings against newspaper proprietors, &c., for publishing advertisements relating to lotteries, must also be taken in the name of the Attorney-General.

Rogue and vagabond.

(3.) The third alternative, which, perhaps, is the proceeding most likely to be adopted in ordinary cases as being the least cumbrous, is to prosecute the offender as a rogue and vagabond under 42 George III., c. 119, s. 2.

By the late Summary Jurisdiction Act,[1] it is within the discretion of magistrates to inflict a fine in lieu of imprisonment on persons convicted as rogues and vagabonds. In *Taylor* v. *Smetten*, where the magistrates had convicted the defendant and fined him 20s. the Court intimated a doubt as to whether the conviction was properly made. "The form of the conviction is not before us. If the appellant was convicted as a rogue and vagabond, and the justices imposed a fine of 20s. in lieu of imprisonment, as they are entitled to do under 42 & 43 Vict., c. 49, s. 4, then we think the conviction was right. If, however, without convicting him as a rogue and vagabond, they simply convicted him of keeping a lottery and fined him 20s. for so doing, under 42 George III., c. 119, s. 2, then we think the Statute 46 George III., c. 148, s. 59 (3), applies, and the conviction could not be upheld." *Reg.* v. *Tuddenham*.[2]

Arrest under warrant.

By 42 George III., c. 119, s. 4, justices may upon information on oath, by special warrant "under his or their hands or seals," authorise any person by day or night (but if in the night-time, in the presence of a constable) to break open doors where any offence against the Act is being committed and arrest all persons aiding in carrying on lotteries or little-goes. Persons employing others to carry on any such transactions to be deemed rogues and vagabonds.

[1] 42 & 43 Vict., c. 49, sec. 4. [2] 11 Q. B. D., at p. 212.

Section 6. Offenders may be apprehended on the spot by any person and carried before a justice of the peace.

Art Unions.

A special exception has been made by statute in favour of art unions, or associations formed for distributing works of art by lot, a method of proceeding which would be probably held to infringe the Lottery Acts were it not for the fact that they are legalised by 9 & 10 Vict., c. 48. This Act provides that all voluntary associations constituted for the distribution of works of art by lot are to be deemed lawful associations, and the members and subscribers freed from all penalties under the Lottery Acts. Provided that Royal Charter be first obtained for the incorporation of such association, and the instrument constituting such association, together with its rules and regulations, be approved by the Privy Council.

CHAPTER IV.

GAMING HOUSES.

In Bacon's Abridgment (*tit.* Gaming) it is stated "that by the Common Law the playing at cards, dice, &c., when innocently practised, and as a recreation the better to fit a person for business, is not at all unlawful; yet if a person be guilty of cheating, as by playing with false cards, dice, &c., he may be indicted for it at Common Law and fined and imprisoned. So, also, a common player at hazard, and using false dice, may be indicted for it at Common Law and set in the pillory. An information against a person using the game of cock-fighting may be at Common Law. Also all common gaming houses are nuisances in the eye of the law; not only because they are great temptations to idleness, but also because they are apt to draw together great numbers of disorderly persons, which cannot but be very inconvenient to the neighbourhood." Instances are then given of cases in which the Courts have relieved against liabilities incurred by excessive gaming.

It is clear from this statement that the essence of illegality at Common Law was fraud and excess, and that all establishments which were kept for gaming purposes necessarily led to excess. This being so, it would seem that in point of principle, the Statutes 16 Charles II. and Anne, of which mention has been made in another part of this work, was only declaratory of the Common Law, seeing that it only dealt with fraudulent and excessive gaming, though no doubt it laid down particular tests which did not exist before, as to what should constitute excessive gaming.

Gaming houses illegal

In *Reg.* v. *Rogiere*[1] defendants were indicted "for that they

[1] 1 B. & C., 27.

at Common Law.

did unlawfully keep and maintain a certain common gaming house, and in the said common gaming house did cause and procure divers idle and ill-disposed persons to frequent and come to play together at a certain unlawful game called *Rouge et Noir*, for divers large and excessive sums of money." The Court held that the keeping a house of this description was an offence at Common Law—HOLROYD, J., adding that in his opinion, it would have been sufficient merely to have alleged that the defendants kept a common gaming house.

25 Geo. II., c. 36, sec. 5.

The Statute 25 George II., c. 36, s. 5, confirmed this view of the Common Law; for after reciting the prevalence of disorderly houses, enacts, that to encourage prosecutions against persons keeping gaming houses &c., it should be lawful for any constable, upon information from two inhabitants of the district, to take proceedings as therein specified. Finally,

2 & 3 Vict., c. 47, sec. 48.

in 2 & 3 Vict., c. 47, s. 48, we find an enactment that the Commissioners of Police in the Metropolis may authorise constables to enter houses suspected of being used as common gaming houses and arrest persons found therein. *Provided* that nothing should prevent the prosecution by indictment of any person having the care or management of any gaming house.

Both these statutes clearly regard the keeping a gaming house as an indictable offence; both prescribe certain methods of procedure; one even goes so far as expressly to preserve the Common Law remedy. It is, however, remarkable that in none of the writers or cases is any definition of a common gaming house attempted.

Houses for unlawful games.

There is also a series of statutes dealing with houses kept for playing unlawful games.

Thus, 33 Henry VIII., c. 9, prohibited the keeping of any common house or place of dicing table or carding, or any other manner of game then prohibited or thereafter to be invented. 13 George II., c. 19, s. 9, inflicts penalties on any person keeping any office, table, or place for the games of passage or games with dice, except backgammon. 18 George II., c. 34, prohibits the keeping of any house, room,

or playing roulet or roly-poly, or any game with cards or dice already prohibited by law. It is stated in Hawkins (Pleas of the Crown, I. 725) that these statutes did not aim at occasional gaming for recreation at an inn which was not kept for the purpose. The games, too, were only unlawful *sub modo*, and were not prohibited in a man's private grounds. Finally, there are the provisions against keeping houses for lotteries, the principal statute on this subject being 42 George III., c. 119, which, as has been shown above, makes it penal to keep any "office or place" for "Little-goes."

Unlawful games.

In some few cases particular games have been declared unlawful.

Thus the Statute 12 Richard II., c. 6, made tennis, football, quoits, dice, unlawful when played by artificers and labourers. Section 16 of 33 Henry VIII. prohibited the same games with the addition of cards, dice, talles, and bowls, to labourers and mariners or any serving man.

By 2 George II., c. 28, power is given to justices to commit all persons to prison found playing any unlawful game.

12 George II., c. 28, s. 2, made the games of faro, ace of hearts, basket and hazard, illegal as lotteries, inflicted the same penalties as for setting up a lottery, and £50 on the players.

8 & 9 Vict., c. 109.

All these three subjects, keeping gaming houses, keeping houses for unlawful games, and playing at unlawful games, were in some measure dealt with by the important Statute 8 & 9 Vict., c. 109, s. 18 of which, it will be remembered, all wagers were declared void. This statute now forms the basis of the modern legislation on the subject of gaming houses.

Section 1 of this Act repeals so much of the Statute of Henry VIII. as declared any game of mere skill to be an unlawful game[1].

[1] The importance of this as bearing on the present law of unlawful games is dealt with in *Turpin* v. *Jeaks* (see *post*).

With respect to gaming houses, &c., it deprives noblemen of the power of granting licenses to their servants for keeping a common gaming house or playing any unlawful games. With respect to the distinction which seemed to exist between keeping a common gaming house and keeping a house for unlawful games, it is clear that the two offences are by this statute brought under one category. For Section 2, after reciting that doubts had been expressed whether houses open to subscribers only were common gaming houses, enacts that in default of other evidence proving any house to be a common gaming house, it shall be sufficient in support of an indictment or information to prove: (1) That the house or place is kept or used for playing therein any unlawful game. (2) That a bank is kept there by some of the players exclusively of the others. (3) That the chances of any game played therein are not alike favourable to all the players.

Sec. 2. Evidence of a gaming house.

So that by this enactment a house kept or used for playing unlawful games is placed on the same footing as a common gaming house, and the owner or manager punishable accordingly.

By Section 4 of the Act a penalty of £100 or six months' imprisonment is inflicted on the owner or keeper of every common gaming house, or the person having the care of management thereof, and also every banker, croupier and other person conducting the business of any common gaming house.

Sections 10 to 13 relate to the granting of billiard licenses —it having always been doubtful whether billiards were within the Statute of Henry VIII.

The Statute 17 & 18 Vict., c. 38, is the next statute on the subject of gaming houses, and in addition to some stringent provisions designed to prevent the Act 1845 being evaded or rendered a nullity, it introduces an offence termed "keeping a house for unlawful gaming," for which a penalty of £500 is inflicted.

17 & 18 Vict., c. 38.

After reciting the powers given to justices out of the Metropolis, and to the Commissioners of Police within the

Metropolitan district by 8 & 9 Vict., c. 109, and reciting that keepers of gaming houses contrive by fortifying the entrances to keep officers out of the houses until the instruments of gaming have been removed, provides:—

Section 1, that any person who shall obstruct any officer authorised by the Act 8 & 9 Vict., c. 109, to enter a gaming house, or who by any bolt, bar or chain, or other contrivance, shall secure any external door or internal door of, or means of access to any house, room or place, so authorised to be entered, or shall by any other contrivance obstruct the entry authorised as aforesaid to, of any constable or officer shall be liable to a penalty of £100, or in the discretion of the Court to be imprisoned with or without hard labour for six months.

Section 3 imposes a penalty of £50 or three months' imprisonment, on any persons found in gaming houses by officers entering as aforesaid and refusing to give his name and address or giving a false name or address.

Section 4. Any person being the owner or occupier of any house, room or place, or having the use of the same who shall open, keep or use the same for the purpose of unlawful gaming being carried on therein; and any person being the owner or occupier of any house or room, shall knowingly and wilfully permit the same to be opened, kept or used by any other person for the purpose aforesaid, and any person having the care or management of, or in any manner assisting in conducting the business of any house, room or place kept or used for the purposes aforesaid, and any person who shall advance or furnish money for the purpose of gaming with persons resorting thereto, is liable to a penalty of £500 or twelve months' imprisonment.

The following is a summary of the different offences respecting *Gaming Houses*:—

Offences under the Gaming House Acts

(1.) Being the owner or keeper of a common gaming house or permitting a house to be so used.

(2.) Having the care or management or conducting the business of the same. As to what comes under this provision.

Section 4 of the earlier Act expressly mentions the banker

or croupier of such a house. It is presumed that the decision in *Reg.* v. *Cook*,[1] which arose under the Betting House Act (see *post*), would apply to this section, viz., that the law only extends to persons taking a share in the illegal part of the business.

(3.) Obstructing officers authorised to enter a house under the provisions of section 3 or section 6 of 8 & 9 Vict., c. 109 —penalty £100 or six months' imprisonment, section 1 of 17 & 18 Vict., c. 38.

(4.) Any person found in a gaming house by officers entering under the above power, and giving a false name and address or refusing to give his name or address, is liable to a penalty of £50 or three months.

What constitutes a gaming house?

It is now necessary to inquire what constitutes a common gaming house within these Acts. It must, however, be remembered that persons may be brought within the above provisions concerning resisting officers and giving false names and addresses, even though it may turn out that a particular house be not eventually proved to come within the Acts. The officer's justification for entry is the magistrate's warrant, or in the metropolis the direction of the commissioners. So that the owners of a house could not justify any resistance to constables who enter by virtue of the Act, by proving that the house is not a gaming house.

The question as to the evidence necessary to prove that a house is a gaming house, is partly answered by the statutes.

Evidence.

Thus, section 2 of 8 & 9 Vict., c. 109, after reciting that doubts had arisen whether houses open to subscribers only were common gaming houses, provides that in default of other evidence it shall be sufficient to prove—(1) That the house or place is kept or used for the purpose of playing therein any unlawful game. The subject, Unlawful Games, has been treated above, p. 125. (2) That a bank is kept there by some of the players exclusively of the others. (3.) That the chances of any game played therein are not alike favourable to all the players.

[1] 32 W. R., 795.

By section 8, where any cards, dice, balls, counters, tables, or other instruments of gaming used in playing any unlawful game shall be found in any house, room or place suspected to be used for a common gaming house, and entered under a warrant or order issued under the provisions of this Act,[1] or about the persons of those who shall be found therein, it shall be evidence until the contrary appears, that such house, room or place is used as a common gaming house, *and* that the persons found therein were playing therein.

By 17 & 18 Vict., c. 38, s. 2, where any constable authorised under 8 & 9 Vict. to enter any house, &c., is wilfully prevented, or obstructed, or delayed in entering in the manner specified, or where any external or internal door of or access to any such house, &c., is found fitted or provided with any bolt, bar, chain, or other means or contrivance for the purpose of obstructing such officers, or for giving an alarm in case of such entry, or if such house is found provided with any means or contrivance for unlawful gaming, or for concealing, removing or destroying any instrument of gaming, it shall be evidence until the contrary be made to appear, that such house is used as a common gaming house.

Private houses.

It must be remembered that a club or private house may equally be a common gaming house as a public place of resort. This is clear from the recitals of section 2 just quoted. The matter is also put beyond all doubt by the late case of *Turpin* v. *Jenks*,[2] where Mr. Justice HAWKINS says that to hold otherwise would lead to evasion by placing a wide limit on the numbers.

It would appear, also, from the same case that a house or club might still be a common gaming house, if it were kept for the double purpose of social pursuits and gaming, if gaming were one of the objects for which the club was

[1] See sections 3 and 6, *post*.

[2] See *post* for a full account of the case: it is not yet reported, but will probably be found in 13 Q. B. D.

Excessive gaming evidence.

formed, or a house kept open. It is also expressly laid down that excessive gaming is evidence that a house is a common gaming house, Mr. Justice SMITH considering that excessive gaming was unlawful in itself, in spite of the repeal of the provisions of the Act of Anne, and section 8 of 18 George II.

Keeping a house for unlawful gaming.

In section 4 of the Act of 1854 we find, if not a new offence, at any rate new phraseology. The offence there spoken of is not keeping a common gaming house but keeping a house "for unlawful gaming." What unlawful gaming consists in, is not defined; the Legislature evidently supposing that the terms had already received judicial interpretation. The Act of 1845 and the previous sections of the statutes seemed to refer to common gaming houses; and it will be remembered that section 2 of the earlier Act made the playing of any unlawful game in a house, evidence that the house was a common gaming house. It will be seen that the term "unlawful gaming" has just received a construction which places it on the footing of a generalization; embracing the two species of offence, viz., playing an unlawful game and keeping a gambling house. The effect and meaning of the term "keeping a house for unlawful gaming," has of late been thoroughly discussed in the case of *Turpin* v. *Jenks and others*, commonly known as the Park Club case. Jenks, the defendant in the Court below, was the proprietor of a club house in Park Place, St. James', managed by a committee of four members, by whom the other members were elected. The subscribers were 270 in number, each paying a yearly subscription. By the rules of the club, hazard and games with dice were forbidden, and points at whist were not to exceed £1. All games were to be played for ready money. It was proved by the night steward of the club that a game called baccarat was played nightly among the members. That play commenced at 4.30 p.m., and continued until 7.30, and began again at 10.30, and lasted till 3 or even 8 a.m. Baccarat is a fair game among the players, the chances being equal; it is a

game both of skill and chance, but chiefly of chance, and there are no advantages to be derived except from skill or luck. It is played with three packs of cards, and banks are formed varying in amount from £50 to £1,000, the whole of which might be lost or won in about twenty minutes. It was from these banks that the profits of the proprietor, calculated to amount to at least £10,000 a year, were derived. There were no other profits made in the club except the banks; cigars and wine were sold at cost price; the kitchen was carried on at a loss; the subscriptions were barely enough to meet the club expenses. The number of members was limited to 500. The proprietor, the members of the committee, and some of the players were summoned before Sir JAMES INGHAM at the Bow Street Police Court[1] for keeping a house for unlawful gaming, and were all convicted in penalties of varying amounts.

These convictions were affirmed in the Divisional Court, except in the case of the players. HAWKINS, J., in giving judgment, said that the real question was whether this house was kept for the purpose of unlawful gaming. There could be no question that gaming was the chief object of the club. The social arrangements were quite ancillary to the gaming purposes. The club rules against gambling, though admirable on the face of them, were really intended to conceal the real objects of the club. Even if it had been a *bonâ fide* social club, for the double purposes of society and gaming, it would still be within the statute as a house opened and kept for unlawful gaming, provided the gaming that took place were unlawful. The Statute 17 & 18 Vict., c. 38, is not directed against a person who merely keeps a gaming house; it imposes penalties on persons who open or keep a house for the purpose of unlawful gaming, and those who assist in it.

The question then really is whether the gaming for which the house was opened was unlawful.

[1] The case occurred within the C Division of Police, and so properly belonged to the Marlborough Street Police Court jurisdiction; but being a public prosecution by the police, was heard at Bow Street.

The magistrate put the matter on too narrow a footing in treating it solely as a question whether the games themselves were unlawful; whereas the statute is directed against unlawful gaming, and not merely against unlawful games. Gaming may be unlawful (1) by reason of the place wherein it is played; (2) by reason of the unlawfulness of the game itself. Now, cards are not unlawful either at Common Law or by statute;[1] but it is illegal to keep a common gaming house, and if cards were played therein that gaming would be unlawful.

Two questions therefore arise: (1) Was this a common gambling house? (2) Is baccarat an unlawful game?

(1.) There could be no doubt that this was a common gaming house, and its practices were of the pernicious tendency alluded to by the different law writers and by the judges in *Reg.* v. *Rogiere.* It is immaterial that the numbers of the club were limited; all gaming houses are; and if you allow a limit of 500, why not of 5,000? (2.) As to the illegality of the game, the statutes, with very few exceptions, do not declare any games to be unlawful except when played by particular persons or in particular places. The earliest of the statutes was 33 Henry VIII., which prohibited any common house or alley being kept for the purpose of cards, or dicing, or any unlawful game then known or thereafter to be invented.[2] Some of the provisions of this statute, so far as they affected "games of skill," were repealed. The test, therefore, seems to be whether a game be one purely of skill or not. Baccarat, therefore, being a game both of chance and skill, must be held to be an unlawful game.

The Statutes of Anne and 18 George II., section 8, which laid down tests as to what was excessive gaming (by the former the loss or gain of £10 at one time or sitting, by the latter £10 at one time and £20 within twenty-four hours)

[1] See *Crockford* v. *Maidenhead*, 8 L. T., 217.

[2] Sec. 16 of the Act of Henry forbad apprentices and artificers, &c., to play tennis, bowls, coyting and other games.

were repealed by 8 & 9 Vict., c. 109, section 15, consequently excessive playing is no longer the test of illegality, but it may be some evidence of a house being used as a common gaming house.

The conviction against the players could not be sustained, though they might have been convicted of playing at unlawful games. The players.

A. L. SMITH, J., delivered a judgment to the same effect, differing from HAWKINS, J., only in one point, viz., as to excessiveness making a game unlawful. He considered that the dicta in *Bacon and R.* v. *Rogiere* were still good law, although the particular statutory limits of legality had been repealed.

It would seem that if the decision in this case were pushed to its utmost limits the law might be enforced in cases where games, though technically "unlawful," were merely made the means of innocent recreation. It is not difficult to suppose cases in which a club, though it could not possibly be called a common gaming house, might still be, according to the strict letter of the law, a house kept for unlawful gaming, if a game, not being a game exclusively of skill—say, for example, whist—were one of the objects for which a club was formed. But this is only one out of many applications of the saying, "*Summum jus summa injuria.*" The law wisely leaves much to the discretion of tribunals, lowest as well as highest. The case of gaming houses presents no greater absurdity than the Law of Larceny, according to which the housemaid who abstracts a pin from her mistress's pincushion is liable to the same punishment as a clerk who robs his master's till. In the same way any person who gets up an ordinary sweepstakes for the Derby at a club or a "common room" of one of the Inns of Court brings himself in strictness within the Lottery Acts; but probably no magistrate would convict such person as a rogue and vagabond, as he might do under the statutes.

It is only necessary to mention very shortly another offence constituted by section 4 of the same Act, viz., Lending money for

gaming purposes.

advancing or furnishing money for the purposes of such unlawful gaming, which is visited with the same penalty of £500. Of course the money so advanced cannot be recovered.[1]

Right of partner in gaming house to an account.

The question seems to have been mooted, but never actually decided, whether a partner or a principal could maintain a suit against a co-partner or an agent for an account of profits realised in a gaming or betting house. It will be remembered[2] that the dicta in *Sharp* v. *Taylor* were disapproved by the late Master of the Rolls in *Sykes* v. *Beadon*, viz., that an agent or partner could not set up the illegality of an agreement in answer to a claim for an account. His lordship says,[3] "In my own practice a case occurred in which one of the partners in a gaming house sued the other partner for an account of profits. It did not come on for hearing, because the plaintiff thought better of it, but I am satisfied the bill could not have been maintained; still the assertion of the bill was that the gaming house had been closed and the plaintiff asked for an account on that footing." At the same time in *Beeston* v. *Beeston*[4] the principles laid down in *Sharp* v. *Taylor* were cited with approval.

Perhaps the real distinction is between cases where the accounts have to be taken and where they have already been settled or stated. Probably in the latter case an action would lie to recover a share. In *Johnson* v. *Lansley* (*ubi supra*) the partnership was for betting purposes, which are not illegal.

Cheating at play.

Another offence besides keeping a gaming house dealt with by this statute is cheating at play. By section 17, "Every person who shall by any fraud or unlawful device or ill practice in playing at or with cards, dice tables or other game, or in bearing a part in the stakes, wagers or adventures, or in betting on the sides or hands of them that do play, or in wagering on the event of any game, sport or

[1] See *Foot* v. *Baker*, 5 M. & G. 335.
[2] *Vide supra*, p. 23.
[3] 11 Ch. Div. at p. 196.
[4] 33 L. T. N. S., 700.

pastime, win from any other person to himself or any other or others any sum of money or valuable thing, shall be deemed guilty of obtaining such money, &c., by a false pretence, and punished accordingly." In *Regina* v. *O'Connor*[1] it was held that where persons fraudulently won from another certain property by tossing with coins, that was a "pastime" within the Act if it was not a "game."

As to conspiracy to defraud by the means mentioned in this section, see *Regina* v. *Hudson*.[2]

Betting houses are dealt with in another statute, 16 & 17 Vict., c. 119. Betting houses.

Section 1 provides that no office, house, room *or place* shall be opened, kept or used by the owner or occupier or any person in his employ for the purpose of betting with persons resorting thereto or for the purpose of any money or valuable thing being received by or on behalf of such owner, &c., on an undertaking to pay or give any money or valuable thing on any event relating to any horse-race or other game or pastime. Every such house is declared to be a common nuisance.

Section 2. Such houses are common gaming houses within the meaning of 8 & 9 Vict., c. 109.

Section 3. Any person who being the owner or occupier of any office, house, room or other place, or a person using the same, shall open, keep or use the same for the purposes hereinbefore mentioned or either of them, *or* shall permit the same to be so used, *and* any person having the care or management of or in any manner assisting in conducting any such house or place kept for the purposes aforesaid, is liable to a penalty of £100 or three months' imprisonment with or without hard labour.

By section 4 any person being the owner or occupier of any office, house, room or place opened, kept or used for the purpose aforesaid or either of them, *or* any person acting on Sec. 4. Receiving money on deposit for a bet.

[1] 45 L. T. N. S., 512; 15 Cox, C. C., 3.

[2] 8 Cox, C. C., 305; 4 Cox, 390. It was lately decided by the Divisional Court that "Welshing" was an indictable offence, but the case is nowhere reported.

behalf of such owner or occupier, *or* any person having the care or management or in any manner assisting or conducting the business thereof, who shall receive directly or indirectly any money or valuable thing or a deposit on any bet on condition of paying any sum of money or other valuable thing on the happening of any event or contingency of or relating to a horse-race or any other race, or any fight, game, sport, or exercise, or as the consideration for any agreement to give any money or valuable thing on such event, and any person giving any acknowledgment, note or security on the receipt of any such deposit is liable to a penalty of £50 or three months' imprisonment.

Section 5. Money paid or deposited as in the last section, may be recovered by the depositor as money paid to his use.

Exception in favour of a prize to the winner of a race.

Section 6. Nothing in this Act is to extend to any person receiving any money or valuable thing by way of stakes or deposit to be paid to the winner of any race, sport or exercise, or to the owner of any horse engaged in any race—an exception which seems very analogous to the proviso of section 18 of 8 & 9 Vict., c. 109, exempting "contributions to a prize" from the general law with respect to wagers, which has been discussed above.

Betting houses.

With respect to this statute against betting houses the following are the offences specified:—

Summary of offences.

(1.) Being the owner or occupier of a house or place kept or used (*a*) for the purpose of betting with persons resorting thereto, (*b*) for the purpose of receiving money on deposit in respect of bets.

(2.) Using any such house for such purposes or either of them.

(3.) Having the care and management or assisting in the business of any such house.

The above persons are each liable to a penalty of £100 or six months' imprisonment. They are, in addition, liable to be indicted for a nuisance, seeing that such houses are declared to be, by section 1, common nuisances; by section 2, gaming houses within 8 & 9 Vict., c. 109.

(4.) By section 4, all the above persons (*i.e.* the owner or occupier of such house or place, or any person acting on his behalf, or any person having the care or management or assisting in conducting the business) are liable to a penalty of £50 or three months for receiving money or other valuable thing as a deposit on a bet, and by section 5 the depositor may recover the money deposited as money paid to his use. But section 6 contains an exception in favour of any stakes or deposit to be paid to a winner of a race, or the owner of a horse that is running (*vide supra, Manning* v. *Purcell*, p. 53). It is not very easy to see what the practical effect is of providing that betting houses shall come within the meaning of common gaming houses in 8 & 9 Vict., c. 109; the enactments in section 2 of the latter Act, are such as could not apply to a house merely kept for betting purposes, while 16 & 17 Vict. itself declares betting houses to be common nuisances, inflicts a specific penalty for keeping them, and contains provisions for entering and searching them.

Receiving deposits.

Exception in favour of prize.

? Effect of sec. 2.

(5.) Another species of offence prohibited by this Act is advertising houses or places as being opened or used for the particular kind of betting prohibited by the Act. This is by virtue of section 7, the provisions of which, as will appear more fully hereafter, are supplemented by a later statute, 37 Vict., c. 15.

The questions and cases which have arisen and been decided under section 1 and section 3 of the Act of 1853, may be grouped under the following heads:

Cases under the Betting House Act. Secs. 1 and 3.

I. What is a "place?"

II. What constitutes user for betting purposes of a house or place?

III. What kind of betting is within the Act?

IV. What is the extent of a manager or assistant's liability?

V. Receiving money on deposit within the Act.

I. The meaning of the term "place" which is used in the Acts directed against gaming and betting houses, as in fact it is in all the previous statutes on the subject of houses and "places" kept for the purposes of gaming or playing un-

What is a "place"?

lawful games, has undergone a great deal of discussion. It will be remembered that the statute 4 Geo. IV., c. 60, declared the term "place" as used in previous statutes, particularly the Lottery Acts, to mean "a place in or out of enclosed premises, whether on land or water." Even if this statute cannot be regarded strictly as interpretative of all statutes, it may at any rate be a guide to the meaning of the term in other statutes.

A table in Hyde Park.

In *Doggett* v. *Catterns*[1] the defendant was in the habit of resorting to Hyde Park and keeping a betting table. *Held*, that though it was not necessary that a "place" should be under cover, still a spot in a public park which could not have an owner or occupier, would not come within the Acts. Per POLLOCK C.B., on the ground that a place to be within the Act must be capable of having an owner or occupier. Per BRAMWELL, on the ground that it was not an ascertained place. Per LUSH, J., in *Eastwood* v. *Miller*[2] "the person there was not an occupier of the place and he had no business to use it for that purpose." In the course of the arguments a remark was made by BRAMWELL B. that the table occupied by the defendant could not be a common gaming house within section 2. This seems to suggest that nothing could be a place within the Act unless it could by a fair construction be considered a gaming house. His lordship's observation does not seem to have been made use of in arguing subsequent cases: if such be the test, the word "place" would seem to require a much more limited interpretation than it has since received from the Courts.

The case of *Morley* v. *Greenhalge*[3] was quoted by LUSH, J., in *Eastwood* v. *Miller*,[4] as depending on the same principles as *Doggett* v. *Catterns*. It was held that a person could not be convicted of keeping, using, or acting in the management of any place for the purpose of cock-fighting, or of suffering

[1] 19 C. B. N. S., 765; 34 L. J. C. P., 159.
[2] L. R., 9 Q. B., at p. 443. Qy. whether the case would not come within 36 & 37 Vict., c. 94.
[3] 3 B. & S., 374; 32 L. J. (M. C.) 93.
[4] L. R., 9 Q. B., at p. 444.

or permitting it to be so used (contrary to 12 & 13 Vict., c. 92, section 3) who resorted to a quarry of which he was not the owner or occupier, for the purpose of aiding in a cock-fight. The owner of the quarry had nothing to do with the men being there, and they had no business there. It seems that in *Eastwood* v. *Miller*, the Court took a different view of the ratio of the decision in *Doggett* v. *Catterns* to that taken by the judges in *Bows* v. *Fenwick*, the former looked upon it as decided on the ground that it was a public place, and the defendant had no business to use it for betting purposes. The latter, rejecting the argument based on the fact that a man "might be ordered to move on," distinguished *Doggett* v. *Cattern*, as will be seen, on the ground that no fixed place was used.

In *Shaw* v. *Morley*[1] there was a space railed off near the enclosure of a race course, about 44 yards by 2. It was let out to a tenant who paid rent for it, and by him divided into partitions; in each partition there was a wooden structure, 5 ft. in height, fronting both ways, in which betting transactions were conducted, but which had no roof. It was contended for the defendant that these structures were not offices or places within the Act, which was directed against betting in towns, and the words "house" or "place" must be *ejusdem generis* with the words "house" or "room." *Held*, that the Act was wide enough to cover betting out of towns; that this was a place and an office within the Acts; and that defendant was conducting a business within section 3. Per KELLY, C.B.: "It is no matter whether there is a roof or none, or whether the structure is moveable or fastened to the earth." Per MARTIN, B.: "The structure described was both an office and a place. What it most resembles is those moveable offices on wheels, in which merchants conduct their business of lading and unlading ships in the docks of Liverpool, and I have no doubt that such a structure would be an office or a place within the meaning of the Act. But this was more, it was a fixed place."

Betting out of towns.

Moveable offices.

[1] L. R., 3 Ex., 137.

This case decides three points—(1) That the Act is wide enough to reach betting in rural places. (2) That an uncovered as well as a covered spot may be a place within the Acts. (3) Any locomotive structure may also be a place. But the judgment of GROVE, J., in *Galloway* v. *Maries* (*post*) should be compared with this.

An umbrella may be a "place."

In *Bows* v. *Fenwick*[1] an umbrella was held to be within the Act. Defendant was on a racecourse, standing on a stool which was covered by a large umbrella capable of covering several persons, the stock being made in joints like that of a sweep's brush, so as to be taken in pieces. On the umbrella were written the defendant's name and address. There was also a card exhibited on which were the words, "We pay all bets first past the post." The umbrella was kept up whether the weather was wet or dry. Numerous bets were made by the defendant. It was argued that this case was like *Doggett* v. *Catterns*, the place which defendant occupied being public, and that no erection could constitute a place within the Act, from which defendant could be ordered to move on. The Court held that this was a place within the Act. They considered it more like *Shaw* v. *Morley* than *Doggett* v. *Catterns*. In the latter case there was no fixed place within the park at which defendant was stationed. Here, the card and the umbrella with the inscription clearly indicated a fixed and ascertained place where the defendant carried on a prohibited business.

Enclosures.

In *Eastwood* v. *Miller*[2] the defendant was in occupation of a large enclosure of more than three acres, where a pigeon-shooting match was going on. The Court held that the fact of its being a large enclosure did not affect the question; and that it was a place in spite of the fact that there was no structure erected therein.

But the case is more important on the question of "user." The same remark also applies to *Haigh* v. *Sheffield*,[3] which was another case of an enclosure used as a cricket ground. It

[1] L. R., 9 C. P., 339. See 36 & 37 Vict., c. 94.
[2] L. R., 9 Q. B., 440. [3] L. R., 10 Q. B., 102.

was again argued unsuccessfully, that "place" meant something of the same nature as "office" or "house." But it may now be taken as settled that any kind of enclosure, whether covered or not, with or without an erection, may come within the Acts.

A bookmaker on a stool in the grand stand.

Finally we come to the case of *Galloway* v. *Maries*, in which the Court went a step further in curtailing the bookmaker's liberty of action on a racecourse.

A race meeting was held in Four Oaks Park, belonging to a company, admission being by payment. Defendant and another man A obtained entrance to a railed enclosure called the ring, attached to the grand stand. A stood on a wooden box not attached to the ground, and both he and defendant offered to make bets with people about, A receiving the money, and defendant entering the bets in his book. They remained in one place the whole time. The Court held that this was a "place" within the Act. The justices had submitted for their consideration—

Questions submitted to Court.

(1.) Whether the enclosure was "a place."

(2.) Whether the box was "a place."

GROVE, J., said the questions were not well framed. "The box, which is a moveable thing, cannot of itself be a place, and perhaps the enclosure might not of itself be a place within the Act. The real question is whether the facts in the case constituted a 'place.'" After referring to the previous cases continued: "I am inclined to think that the more important consideration is the fixity of the place, not, indeed, the absolute fixity as in the case of fixtures, but in the sense of the place being and remaining the same for a considerable time, long enough for the betting public to know where persons willing and offering to bet might be found. I do not say whether a person standing on a carriage step or in a circle where the turf was cut away would be within the Act, but I am far from saying he would not be so.

Upon this case it may be observed—

(1.) That from the remarks of GROVE, J., about the frame

of the questions, the real issue is not whether a particular structure or spot is "a place" or not, but whether, coupled with all the facts, the use to which it has been put, &c., a place has not been constituted by the act of the person.

(2.) That the remark of GROVE, J., as to the box not being a place as being moveable, is in contradiction to the views of KELLY, C.B., and MARTIN, B., in *Shaw* v. *Morley* (*vide supra*). In the latter case it was the certainty rather than the fixity of the place that was taken as the test.

(3.) It was the fact that defendants occupied one spot the whole time that formed the grounds of the judgment. If this is the true state of the law, a betting man would not be within the Act if he changed his spots from time to time, even though he advertised his vocation by words or signs; but since the decision in *Reg.* v. *Cook*[1] it would seem from the remarks of HAWKINS, J., that a betting man in an enclosure attached to a grand stand might still be brought within the Act as "using a place for the purpose, betting with persons resorting thereto." After *Eastwood* v. *Miller* and other cases, there can be no doubt such an enclosure is "a place," and it seems equally clear from *Reg.* v. *Cook* that the operations of betting men in such enclosures are just the sort of betting which the statute prohibits.

User for betting purposes.

II. With regard to evidence of user for betting purposes, it seems that a club where the members bet is not within the Act.

A club.

Thus the case of *Oldham* v. *Ramsden*[2] goes to show how far a club at which betting is extensively practised, and in which there was a separate room kept for betting purposes, comes within the Act. Plaintiff was commission agent and in the habit of making bets for other persons; he was also a member of a club at Manchester called "the Ellesmere," which consisted of over 1,400 members. It had one room in which betting took place, and in the others were refresh-

[1] 32 W. R., 795; given *post* in full.
[2] 44 L. J. C. P., 309; 32 L. T. N. S., 825.

ments and cards. In the betting room the bets were only made between members and no money was paid by way of deposit. The defendant, who was not a member, employed the plaintiff to back certain horses at certain races. The plaintiff did so by taking the odds against these horses with members of the club, and he informed the defendant of the bets having been so made. The horses lost, and plaintiff having paid the losses sought to recover from defendant. The defendant pleaded that the plaintiff paid the money to and it was received by the owner, occupier or keeper of a certain house, office, room or other place opened, kept and used for the purpose of money being received upon an undertaking to pay money on the event of horse-races by the owner, &c., as the plaintiff well knew, and that the money was paid by the plaintiff to such owner, &c., for the purposes of betting, or on a deposit on a bet. This plea was evidently framed in the provisions of section 1 of the Act.

The only point really decided was whether this club was a place used and kept by the owner or occupier for the purposes of betting.

For the plaintiff (supporting of course the legality of the establishment), it was argued that it was not shown that any money was paid to the owner or occupier in respect of these bets. The plaintiff was not owner; it was only one member betting with another.

For the defendant, on the other hand, that it was sufficient that money was received by "persons using the same," which words did not mean persons acting on behalf of the proprietor. Also that the members were "occupiers" of the club within the Act, so that the receipt by one member from another in respect of a bet would bring the case within the Act.

One member gave evidence that he made a bet with plaintiff, and was paid by him at the club.

The Court held that there was no evidence that this was a place kept or used for the purpose of betting.

It will be observed that this was a very concrete decision

and did not go far towards explaining what cases are and what cases are not within the Act.

Enclosures.

An enclosed ground may be "used for purposes of betting" if betting men are allowed to enter and bet indiscriminately with those resorting thereto. Thus in *Eastwood* v. *Miller* an officer went to the borough park ground at Dewsbury, which was (it was admitted) in the occupation of the defendant. A pigeon-shooting match was about to take place. There were two bookmakers on the ground shouting out 20 to 2 on the match. Two persons went up to one of the bookmakers and made a bet, receiving tickets in exchange. Defendant was within hearing of the bookmakers, but did not take any part or say anything. After the pigeon-shooting match a foot-race took place at which bets were made as before on the pigeon-shooting.

Eastwood v. *Miller*.

It was objected that there was no evidence that the grounds were kept or used for the purposes of betting, as only one bet was proved to have been made. But the Court held that there was sufficient evidence to justify the magistrates in coming to the conclusion that the premises were used for betting as well as pigeon-shooting, and that the two objects were combined. Defendant knew that persons going there would bet upon the matches, and they were allowed to bet there.

Haigh v. *Sheffield*.

In *Haigh* v. *Town Council of Sheffield*[1] defendant occupied a house, and an enclosed piece of ground adjoining, used for cricket, foot-races, &c. Within the grounds, but outside the space reserved for the runners and amongst the spectators, some fifteen or twenty persons, being clearly professional betters (George Trickett being one of them), stood on chairs and stools in different spots, with books in their hands, calling out the odds on the different runners and betting with different persons. Numerous bets were made by the visitors to the grounds, such persons each depositing one shilling and receiving a ticket. It was admitted that the defendant knew what was going on, and took no steps to

[1] L. R., 10 Q. B., 102.

prevent it. Upon the question whether defendant could be convicted of keeping or using the place for the purpose of betting, BLACKBURN, J., expressly leaves the question open whether the place must not, to be within the Act, kept for the purpose of the particular kind of betting mentioned in the preamble to the Act, viz., receiving money on deposit. Anyhow, in this case, as in *Bows* v. *Fenwick* and *Eastwood* v. *Miller*, there was evidence of deposits having been paid. "It may well be," said his lordship, "that the Legislature intended to confine it to that kind of betting, leaving it to future legislation to extend the enactment if necessary. . . . . It is clear that the magistrate came to the conclusion that the appellant knew that people resorted to the enclosure for the purpose of betting, and permitted foot-racing to go on and these betting men to come in, knowing the betting to be an ordinary consequence. The magistrate was right, therefore, in saying the appellant did permit the place to be used for betting, on the principle that a man must be taken impliedly to be answerable for what he knows to be the ordinary consequence of what he permits . . . . The appellant keeps the grounds for both purposes (foot-racing and betting); and it is immaterial which purpose is ancillary to the other. Then it was said the place was not shown to have been 'habitually' used for betting: the word does not occur in the statutes; but I think, if it were necessary to show it, there was ample evidence from which the conclusion might be drawn, that it was habitually used; and, moreover, I am of opinion, though the magistrate would not probably have found that the place was 'used' for betting if only one instance of betting had been proved, still, if the occupier of the place, knowing that betting was going on in this way, though only once, allowed it to be carried on, he would be guilty of permitting the place to be used for betting within the statute. I repeat that I do not express any opinion whether the Act is restricted to cases in which the betting is carried on by means of money actually deposited."

MELLOR, J., also reserves the same question. LUSH, J., in his judgment, points out that while ordinary gambling transactions had been dealt with by 8 & 9 Vict., c. 107, the present statute was directed against a more degenerate form of gambling. The words of the enacting part go beyond the words of the preamble, not for the purpose of extending the operation of the Act, but for the better carrying out the object intended, and reaching every kind of evasion which might be attempted. But his lordship does not seem to express any opinion upon whether the Act is confined to receiving money on deposit.

The important points in these two cases seem to be (1) It is an open question whether the Act 16 & 17 Vict., c. 119 applies to houses or places kept for betting of any kind, or only for ready money betting. It must not be forgotten that section 1 declares any house kept for the purpose of betting with persons resorting thereto, or for the purpose of receiving money on deposit; as though it intended to include, not only the latter kind, but any kind of betting whatever, and the penalties in section 3 are inflicted for keeping a house for the purposes aforesaid *or either of them*; thus seeming to aim at houses kept both for betting generally and betting for ready money. (2) That using a place for betting for a single day only is sufficient to bring a case within the statute; and, according to *Eastwood* v. *Miller*, one act of betting proved may be enough. (3) If a person who is the owner or occupier of a ground kept for athletics, &c., knowingly admits betting men into the premises, and takes no steps to prohibit betting, he uses the place for the purpose of betting within the Act.

Betting within the Act. III

With respect to the kind of betting that is within the Act considerable uncertainty has always been felt owing to the lack of decisions on the subject. In the above case of *Haigh* v. *Sheffield* it was observed by LUSH, J., that the statute was intended to deal, not with the ordinary practice of betting or wagering, but with a more degenerate form of gambling,

and one of a more demoralising tendency. At the same time his lordship does not explain exactly what kind of betting is affected by the statute. A case which really does throw some light on the matter is *Oldham* v. *Ramsden*,[1] though the grounds of the decision are not very clear. But it was there held that a club where the members habitually bet with one another is not within the Act. This construction of the Act has lately been confirmed in a case in which the whole subject was much discussed.

Oldham v. *Ramsden.*

In the late case of *Reg.* v. *Cook*,[2] before HAWKINS and A. L. SMITH, JJ., defendant was convicted by justices for that he unlawfully had the care and management of a certain cricket ground opened and kept for the purpose of persons betting thereon, on certain events and contingencies relating to a bicycle race. He was merely the manager employed by the directors of a company. At a bicycle race betting men were in the grounds among 20,000 people, and they took down bets, and the odds were called out in a loud voice. Cook acted as judge of the race, and stood about twenty yards off from where the betting went on. Boards were put up that no betting would be allowed. The appellant knew there was betting though not taking part in it, but he could not have wholly prevented it, though with the aid of some constables he might have to some extent done so.

Reg. v. *Cook.*

HAWKINS, J., said, in giving judgment, that the conviction itself disclosed no offence at law. Defendant was convicted of having had the care and management of a certain place used for the purpose of other persons betting therein. This would include ordinary betting, which was not interfered with by the statute, as his lordship in the course of his judgment explains. Dealing then with the facts proved in the case, his lordship said that they did not bring the case within the statute. Before the Act of 1883 there existed in London and elsewhere a number of offices and houses in

Form of conviction.

[1] 44 L. J., C. P., 309. 32 L. T. N. S., 825.
[2] See 48 J. P., 357, and 32 W. R., 795.

which a regular betting business was carried on, sometimes conducted by the owners and occupiers, sometimes entrusted to the care and management of clerks and servants. The method of business was to keep long lists of races about to take place, with the current odds placarded in the office, and the owner or manager received ready money from all sorts of persons to abide the event. This was what the Legislature designed to prevent. So much for betting houses, which are declared to be a common nuisance.

Section 3, however, is directed against certain individuals — owners, occupiers, and persons using the premises for the purposes mentioned—persons permitting them to be so used, and managers of the premises so used. In this case the management by the defendant was perfectly lawful. The Act only contemplates a taking a part or share in the management of an unlawful part of the business. His lordship was far from saying that no offence was committed on the grounds. There were clearly men on the grounds for both of the illegal purposes of betting mentioned in section 1. If these men went down to this place for the purpose of betting with persons resorting thereto, or even if they limited their operations to receiving money on deposit, they could be made responsible; there is ample evidence that those men used the grounds for both these purposes. Defendant did nothing but manage the lawful part of the business; and the mere knowledge that betting of an illegal character did take place in some part of the grounds, shows no offence within the Statute.

Mr. Justice A. L. SMITH said that if the manager of the grounds were held liable, it would be difficult to see how any man employed to sweep the paths at Lillie Bridge could escape responsibility if betting were proved to go on there.

It is clear, therefore, from this most important case that the Act does not prohibit people keeping houses, clubs or grounds at which members or people congregate for the purpose of betting with one another. This is laid down not only by Mr. Justice HAWKINS in *Reg.* v. *Cook*, but also

in a case alluded to above, *Oldham* v. *Ramsden*. What the law does forbid is people keeping houses or places for the purpose of betting themselves with persons resorting thereto, or allowing other people to use the house for the same purpose; it also inflicts a penalty on persons who use the premises for that purpose. That is to say (and this is obviously the construction put upon the Act in *Reg.* v. *Cook*) if a bookmaker goes into grounds kept for athletic purposes, and advertises himself generally to the people there present as willing to bet, both he himself is liable as a person using the place for forbidden purposes, and the owner or occupier is liable for permitting it.[1] But there is no objection to persons going to a place or meeting at a club for the purpose of betting among themselves; the statute does not prohibit such betting, nor does it call the owner to account for permitting it.

Ordinary betting not prohibited.

It will be observed that this case is in no way inconsistent with any of the previous authorities. In *Eastwood* v. *Miller* and in *Haigh* v. *Sheffield*, there were regular betting men on the ground, betting with all comers, which, according to HAWKINS, J., in *Reg.* v. *Cook*, would bring a case within the Act. Further the expression of his lordship's opinion as to the insufficiency of the form of the conviction is quite in accordance with *Oldham* v. *Ramsden*, where the members met to bet with one another in a club, but the club was not kept by a proprietor for the purpose of betting with the members himself, or of allowing others to use it for that purpose. The question raised by BLACKBURN, J., in *Haigh* v. *Sheffield*, as to whether the statute was confined to ready money betting was not actually decided in *Reg.* v. *Cook*, but it seems to be implied in the remarks of HAWKINS, J., that men attending the grounds would be liable not only for receiving money on deposit, but for betting on credit. At any rate it would be very unsafe in the present state of the authorities for persons to rely on the mere suggestions of

? Betting on credit within the Act.

[1] See the note to *Galloway* v. *Maries*, *sup.* p. 141.

Mr. Justice BLACKBURN, and think they can evade the Act by keeping a house for betting on credit.

Stewards' authority in grand stand.

Considering how the law stands with regard to the liability of owners or occupiers of enclosures, for allowing them to be used for the purpose of betting with the public resorting thereto, it may be as well to notice that by law they have somewhat arbitrary powers in the matter of allowing persons to remain therein, even after they have paid their money. Thus in *Wood* v. *Leadbitter*[1], Lord Eglinton was steward of the Doncaster Races. Plaintiff was in the grand stand, having obtained admission by ticket issued by the authority of Lord Eglinton. Defendant by his lordship's direction ordered plaintiff to leave the grand stand. It was assumed for the purposes of the case that plaintiff had in no way misconducted himself. It was held that the right to come and remain on the land of another could only be granted by deed; otherwise it was a mere licence recoverable at any time without returning the money paid for the ticket.

Liability of a manager.

IV. Questions have also arisen with respect to the liability of a person "having the care or management, or in any manner assisting in conducting the business."

In *Slatter* v. *Bailey*[2] the house was kept by T and his two sons for the purpose of betting on horse-races. One day T and one son sat at one table in a room receiving bets, and in another room defendant and another son of T sat at another table also receiving bets, the betting being called out aloud. On the defendant, when apprehended were found numerous entries relating to past and future races. *Held*, that as defendant was proved to have been assisting the principal in the business, that was evidence that he was using the house, and was taking part in the management within the Act.

This decision is by no means inconsistent with that of *Reg.* v. *Cook*, which has already been fully treated on another point. It will be unnecessary to refer to it again further than to recapitulate very shortly the point as to the liability

[1] 13 M. & W. 838. [2] 37 J. P., 262.

of the manager, viz., that he is not liable unless the business be illegal and he be taking part in the illegal part of the business. In *Slatter* v. *Bailey* this was what defendant was doing; he was assisting the owner in a betting business.

Commission agent receiving money at his office.

V. The following is a decision on the liability for receiving money on deposit.

In *Wright* v. *Clarke*,[1] Wright was charged under section 3 of 16 & 17 Vict., c. 119, with keeping a house and office near Covent Garden for the purpose of receiving money on an undertaking to pay money on events and contingencies relative to horse-races. Advertisements were inserted in the different papers to the effect that he would execute commissions on all races at the best prices, instructions to be sent to his offices in York Street; that he did not lay bets himself but only acted as agent in the matter. "The money sent for investment will be taken into the best market and laid out to the best advantage for clients. All communications must be sent through post, and the replies can only be forwarded in the same manner. Commissions executed to any amount on receipt of the cash. All bets paid the day after the race (less 5 per cent. on winnings), provided the vouchers are sent at the same time." Two or three police officers acting on instructions, gave instructions to Wright by post to back certain horses for some of the Ascot Races, enclosing P.O.O.'s, and they received letters of acknowledgment from Wright, saying that their instructions has been carried out. In one case an officer received a cheque from Wright for winnings minus 5 per cent., Wright's commission. A warrant being issued under section 11 of the Act, Wright and some clerks engaged in filling up papers and forms relating to his betting business were arrested. A large number of documents and books relating to betting were found upon the premises, and also 56,000 vouchers. There was in one of Wright's books an entry of his transaction with one of the officers. Being convicted and fined

[1] 34 J. P., 661.

£100, a special case was stated for the Court of Queen's Bench.

For Wright it was contended: (1) That he was not within the Act, seeing that persons did not resort to his office, the whole was conducted by correspondence; besides he was simply an agent and not a principal. (2) That the vouchers did not amount to an agreement to pay money on a bet, but only contained advice as to the mode of applying for payment. (3) If they did amount to such an agreement the money deposited with him by P.O.O. was not the consideration for such agreement. The real consideration was the 5 per cent. of the winnings retained. (4) That Wright could not be said to have used the house for the purpose of receiving the P.O.O.'s.

The Court held that Wright came within the second part of section 1. The office was kept open and there was a promise, express or implied, to pay the money in the event of a horse-race though nobody entered the house. There could be no doubt Wright was the principal and intended to be responsible for the payment of the bet. An implied promise would suffice to bring the case within the statute.

It will be remembered that by section 4 of the Act each single act of receiving money on deposit, &c., in a house kept for the kind of betting prohibited by the Act, is punishable with a penalty of £50.

Advertising betting houses.

The next kind of offence created by the statute consists in advertising any house or place as being used for betting purposes or for the exhibition of betting lists.

16 & 17 Vict., c. 119, sec. 7.

Section 7 enacts that "any person exhibiting, publishing, or causing to be exhibited or published, any placard, handbill, card, writing, sign or advertisement, that any house, office, room or place is kept or used for the purpose of making bets or wagers in manner aforesaid, or for the purpose of exhibiting lists for betting, or for the purpose of inducing any person to resort to such house, &c., for the purpose of making bets, or any person who on behalf of the owner or occupier of such house, &c., who shall invite other

persons to resort thereto for the purpose of betting, shall be liable to a penalty of £50 or two months' imprisonment."

What persons are forbidden by this section to advertise is: (1) That a house or place is kept for the kind of betting mentioned in a former part of the Act, *i.e.*, section 1. So that to understand what kind of betting it is that must not be advertised, reference must be made to the cases that have been decided thereon. According to the latest case of *Reg.* v. *Cook* (*vide supra*), the betting prohibited is betting by the owner or occupier with persons resorting to the house or place. Whether it would be safe to assume from this that it would be lawful to advertise a house as a resort for persons who wanted to make bets with one another, seeing that (2) it is also forbidden to advertise so as to induce or invite people to resort to a house for betting purposes, not for betting "in manner aforesaid." So that possibly an advertisement in the form suggested might be held to be covered by this part of the section, but see *Cox* v. *Andrews* (*post*). (3) People must not advertise their houses as exhibiting betting lists— that is, people may keep lists of races, current odds, &c., but not advertise the fact. This should be borne in mind by hotel and club proprietors, and all persons whose premises are furnished by means of the "tape" with the latest information as to races. Betting lists may be seized by officers entering premises by virtue of section 11 of 16 & 17 Vict., which speaks of lists and "all documents relating to betting," and also they are expressly mentioned in section 12 of the same Act, which treats of the powers of the Metropolitan Police.

Betting lists.

This statute has been supplemented by a subsequent one, 37 Vict., c. 15, which is described as "an Act to be construed as one with the principal Act of 1853 and to be cited together as the Betting Acts."

37 Vict., c. 15.

By section 3, where any letter, telegram, circular, placard, handbill, card or advertisement is sent, exhibited or published.

(1.) Whereby it is made to appear that any person, either in the United Kingdom or elsewhere, will, on application, give information or advice for the purpose of, or with respect

to, any bet or wager on any such event or contingency as is mentioned in the principal Act; or will make on behalf of any other person any such bet or wager as is mentioned in the principal Act; or

(2.) With intent to induce any person to apply to any house, office, room or place, or to any person with the view of obtaining information or advice for the purpose of any such bet or wager, or with respect to any such event or contingency as is mentioned in the principal Act, or

(3.) Inviting any person to make or take any share in or in connection with any such bet or wager.

Every person sending, exhibiting or publishing, or causing the same to be sent, exhibited or published, shall be subject to the penalties provided in section 7 of the principal Act with respect to offences under that section.

Tipsters' business not prohibited.

What the latter statute prohibits people doing is, not advertising themselves as ready to give information or "tips" with respect to ordinary betting transactions, but only with respect to betting carried on in any office or place where the occupiers carry on such business. Thus in *Cox* v. *Andrews*[1] defendant issued advertisements in the *Licensed Victuallers' Gazette* and *Hotel Courier* that Centaur would, for half-a-crown in stamps, give information and advice with respect to the probable winners of races in the ensuing week. Centaur was the defendant's regular correspondent with respect to horse-races and information relating thereto. There was no address given at which persons desiring such information should apply. *Held* that the advertisement, contemplated in 37 Vict., c. 15, referred to bets made in any office, house or place as referred to in the principal Act, and not to advice with respect to ordinary betting; the Act was to be read with the principal Act, and the only kind of betting prohibited by the latter was that specified in section 1. Of course, this being the purport of the statute, all the cases cited above as to "what is a place," etc., and particularly the case of *Reg.* v. *Cook* as to the kind of betting prohibited

[1] L. R., 12 Q. B. D., 128.

by the Statute 16 & 17 Vict., c. 119, apply to the construction of the supplementary as well as of the principal Act. It does not appear that this case could have the effect of limiting the prohibition against advertising betting lists to advertising in betting houses.

Procedure.

We now come to treat of the procedure whereby the laws against gaming and betting houses can be enforced. It will be observed that it differs in some important respects from the ordinary procedure in criminal cases, in being more drastic and to a great extent less considerate to the liberty of the subject, owing to the great difficulty of detecting the offences and the facility with which the law might be evaded if ordinary forms had to be observed.

Gaming houses.

With respect to gaming houses, the procedure is different according as the house is situated in the metropolis or out of that district. In the metropolis, by 2 & 3 Vict., c. 47, section 48, power was given to the Commissioners of the Police Force, on the report of any superintendent, that there were good grounds for believing that any house within the district was used as a common gaming house, and on two witnesses making oath before a magistrate, to empower the superintendent and other constables to enter the house, arrest all persons found therein, and destroy all tables, instruments of gaming, money, and securities for money. By 8 & 9 Vict., c. 109, section 6, the Commissioners are invested with the same powers except that the necessity of two witnesses making oath before a magistrate is dispensed with.

In the metropolis.

By section 7 special power is conferred on such superintendent or constables to search the whole house where he shall suspect there are instruments of gaming concealed, and any person found therein.

Out of the metropolis.

In the case of houses out of the metropolis, justices of the peace may, on information on oath that there is reason to suspect any house is used as a gaming house, issue a warrant in the form given in the schedule to the Act to empower officers to enter such house by force, and arrest all persons found therein. This section does not empower con-

Form of warrant.

stables to seize or destroy instruments of gaming, like section 6. An important point to notice about the form of the warrant is that it is directed only against a particular house, the individuals who may be arrested need not be named or described. This is an important departure from ordinary procedure, as generally a warrant for an arrest is bad if the name of the person to be arrested or some description of him do not appear on the face of the warrant, as was decided in the "general warrant" cases in George III.'s reign.

By section 5 it is provided that it shall not be necessary in support of any information, for keeping a gaming house, to prove that persons found playing therein were playing for money or stakes.[1]

It does not appear that police magistrates in the metropolis have the power of issuing warrants in the form above described, as the section expressly excludes the metropolitan district.

N.B.—In any questions arising under this Act, reference should be made to the cases which are noted under the corresponding portions of the Betting House Act, as the wording of the two statutes is in many cases similar.

Evidence.

There are also important provisions in 17 & 18 Vict., c. 38, with respect to the power of a magistrate to compel witnesses to give evidence, under section 5 and section 6. All persons apprehended under the powers contained in section 3 and section 6 of 8 & 9 Vict., c. 109, may be required to give evidence touching any unlawful gambling or obstruction of officers in the house, notwithstanding that such evidence may tend to criminate the witness. Such person refusing to be sworn may be dealt with as any ordinary witness so refusing. But every such person who has made full discovery of all the facts he knows is entitled to a certificate from the justices, which frees him from criminal proceedings in respect of matters on which he has been examined.

Levying and application of penalties.

By section 7 penalties and costs may be levied by distress,

[1] See tco *Anderson* v. *Hume*, 46 J. P. 825.

and by section 8 half the penalty is to be paid in aid of the poor-rate of the parish in which the offence is committed, and half to the person laying the information.

In *Wray* v. *Ellis*[1] a question arose as to whether this section applied to penalties paid in the metropolis. By the Statute 2 & 3 Vict., c. 71, section 47, it is provided that all fines paid in London Police Courts shall be paid to the Receiver of Police. The question was whether this enactment was superseded by section 8 of 17 & 18 Vict., c. 38. The Court held that it was not; and that in the latter section an implied exception was contained in the case of penalties paid in the Metropolis, and that therefore the Receiver was entitled.

Neglect to prosecute.

By section 9, if the person who shall have laid the information neglects to prosecute, the justices may authorise some other person to proceed.

Appeal.

Any person convicted summarily under this Act may appeal to the Quarter Sessions on entering into recognisances and finding sureties within 48 hours of his conviction.

No certiorari.

By section 11 no information under the Act is to be removed by certiorari into the Queen's Bench.

Actions against officers.

In the case of actions brought against officers for any trespass or other wrongful proceeding done or committed in the execution of the Act, it is provided (section 13) that no action shall be brought if sufficient tender of amends shall have been made before action brought, and by section 14 no action or other proceeding shall be brought, unless one month's notice in writing shall have been given to the intended defendant, nor unless the action shall have been commenced within three months of the act or omission complained of.

In *Blake* v. *Beech*[2] it was contended for the defendant that by section 14 a month's notice of the information ought to have been given to him, but this point was abandoned by Counsel as untenable, when the case came before the

[1] 28 L. J. M. C., 45; 1 E. & E., 276.
[2] 1 Ex. Div. 320.

Divisional Court; and was also said by the Court to have been "founded on an obvious mistake!"

Vexatious indictments.

Keeping a gambling house is one of the offences mentioned in the Vexatious Indictments Act, 22 & 23 Vict., c. 17, which by section 1 provides that no bill of indictment for any of the offences named shall be presented to the Grand Jury unless the prosecutor or person preferring such indictment has been bound by recognisance to prosecute or give evidence; though by section 2, if the justices decline to commit for trial, the prosecutors may require them to bind him over to prosecute.

Betting houses.

The procedure in the case of betting houses is to a certain extent similar to that in the case of gaming houses, except that the power of magistrates to issue a warrant in the form already described is not limited to places out of the metropolitan district.

Search warrant.

By section 11 of 16 & 17 Vict., c. 119, justices of the peace are empowered, on information on oath that any house is suspected of being used as a betting house, to issue a warrant authorising the forcible entry into any such house, and the arrest and searching of all persons found therein, and also the seizure of all lists and cards and other documents relating to racing or betting found in such house. Such warrant may be in the form given in the schedule to 8 & 9 Vict., c. 109.

In *Anderson* v. *Hume*[1] is was decided (1) that this section empowers the search of licensed houses as well as others, although they are subject in some respects to special regulations; (2) that the power to arrest persons found therein is not confined to persons found engaged in gaming.

In *Blake* v. *Beech*[2] a warrant was issued under section 11 of this Act for the search of a house suspected, as was stated in the warrant, of being used as a common gaming house within 8 & 9 Vict., c. 109. Under this warrant defendant and other persons found therein were arrested. Defendant was afterwards charged under section 3 of 16 & 17 Vict., c. 119,

[1] 46 J. P., 825. [2] 1 Ex. Div., 320.

with keeping a betting house. Ample evidence was given that defendant was manager of the place and that it was used for betting purposes, but this charge was made without any fresh information being laid against defendant. It was objected on his behalf that as the information on which the warrant was granted was laid under 8 & 9 Vict., c. 109, a fresh information ought to have been issued before he could be charged under the Statute 16 & 17 Vict., c. 119.

Whether fresh information necessary.

The Court differed, FIELD, J., holding that no fresh information was necessary. In this case a specific charge was made against the accused sufficient to give the magistrates jurisdiction. The information provided for by section 11 took away the necessity of any further information. Further, according to the current of modern authority, when a man is before a magistrate who has jurisdiction as to time and place, no further information is necessary before bringing any fresh charge against him, though it might be proper to adjourn the hearing.

The rest of the Court, CLEASBY and GROVE, J.J., differed. In the ordinary course a charge is preceded by information or summons. In this case the defendant was brought up on a charge different from that contained in the information. In a penal matter the charge ought to be comprised within the information. There is nothing in section 11 to dispense with the regular information or summons; it only enables persons to be brought before the magistrates so as to know who is to be charged. The conviction was therefore quashed.[1]

The information may be laid before one justice only.[2]

Where an information under the Betting House Act charged defendant with having kept a house for betting purposes on the 5th October "and divers other days." The evidence proved was for the purpose alleged on the 8th of November only. *Held* that under section 9 of 11 & 12 Vict., c. 113, the variance was immaterial.[3]

[1] In the same case (2 Ex. Div., 335) it was held that there was no appeal from the Divisional Court, this being a criminal matter.
[2] *Lee* v. *Gold*, 44 J. P., 395. [3] *Onley* v. *Gee*, 7 Jur. N. S., 570.

For an instance in which a warrant was, under this section, issued in the metropolis, see *Clarke* v. *Wright* (quoted above).

Powers of Commissioners of Police in metropolis.

Section 12 confers the same powers on the Commissioners of Police in the metropolis, on the report in writing of any superintendent, to authorise such superintendent, with other constables, to enter suspected betting houses, as is contained in the Gaming House Act; to take into custody all persons found therein,[1] and to seize all lists, cards, or other documents relating to racing or betting.

The Act also contains provisions similar to those of the Gaming House Act, with respect to appeals to Quarter Sessions, certiorari, and limitations of action (see above, p. 157.)

Gaming in Licensed Premises.

By 35 & 36 Vict., c. 94, if any licensed person (1) suffers any gaming or any unlawful game to be carried on on his premises, (2) opens, uses, or suffers his house to be opened or used in contravention of 16 & 17 Vict., c. 119, he is liable for the first offence to a penalty of £10, and for every subsequent offence to a penalty of £20; the conviction to be endorsed on such person's license.

Knowledge of owner necessary.

The following cases go to show how far actual or constructive knowledge on the part of the owner of the premises is necessary.

In *Redgate* v. *Haynes*,[2] defendant was the landlady of an hotel at Epsom; witnesses proved that three men and a horse-trainer, a jockey, and an inhabitant of Newmarket, were playing cards for money in the sitting room from 11 p.m. The defendant retired to bed, leaving the hall porter in charge of the house. The latter closed the door and retired to his chair in the parlour, at the farthest end of the house. The usual place for such chair was in the hall, and it was his duty to wait upon his guests in the sitting room. From the judgment delivered the following rules may be abstracted: (1) That defendant would not be liable merely for the fact

[1] See *Anderson* v. *Hume*, 46 J. P., 825. [2] 1 Q. B. D., 93.

of gaming unless she knew of it or connived at it. (2) In her absence she was responsible for the conduct of those she left in charge. (3) The fact of the porter moving his chair out of the way was some evidence that he suffered or connived at what was going on, but the judges declined to say whether they would have drawn the same conclusion.

In *Bosley* v. *Davies* there was evidence that persons were playing at cards in the house, but none that the manageress or the attendants knew that gaming was on. One of the players deposed that all the brandies and sodas were served before the playing commenced. The case was sent back to the magistrates with an intimation of opinion from the Court that some knowledge, actual or constructive, or connivance on the part of the owner was necessary.

In *Somerset* v. *Hart*[1] defendant was keeper of licensed premises. On market day, when the inn was very full, two men began gambling with a mug and three nuts. It was proved that the potman knew of the gambling, but took no steps to prevent it, nor did he communicate it to the landlord, who was engaged serving customers at the bar. COLERIDGE, C.J., in giving judgment, distinguished the case of *Redgate* v. *Haynes*,[2] on the ground that there the magistrates thought there was evidence of connivance. *Mullins* v. *Collins* was a case of serving a constable with liquor while on duty; but there the liquor was served by a woman who was probably defendant's wife, to whom the management of the business had been entrusted. Here the magistrates find that there was no evidence that defendant had actual knowledge of the gaming, or that the potman communicated it to him, or that he wilfully shut his eyes to what was going on. All the cases show that there must be something in the nature of connivance.

What is gaming within the Act?

To be within the Act there must be either gaming for money or playing some unlawful game. Thus in *R.* v. *Ashton*[3] (a case within 9 Geo. IV., c. 61, section 21) it was

[1] 12 Q. B. D., 360.
[2] L. R., 9 Q. B., 292.
[3] 1 E. & B., 286; 22 L. J. M. C., 1.

held that playing at dominoes, but not for money, was lawful, dominoes not being an unlawful game.

In *Danford* v. *Taylor*,[1] the game of ten-pins, the losers standing beer all round, was held to be within the Act.

In *Bew* v. *Harston*,[2] a licensed person allowed to be played on his premises a game called "puff and dart," the object of which is to hit a mark on a target with a small dart blown through a tube. The players each contributed 2d. as entrance money, the total sum so contributed being applied to the purchase of a rabbit as a prize for the winners. *Held* that he was rightly convicted of gaming on licensed premises.

Card playing.

In *Patten* v. *Rymer*[3] an inn keeper, whose licence forbad him to suffer gaming on his premises, was held liable under 9 George IV., c. 61, section 21, for playing cards for money with his friends.

Although 37 & 38 Vict., c. 49, permits licensed persons to serve liquors to private friends after hours, there is nothing in that Act which justifies him in allowing the friends in his house to play cards for money.[4] Section 25 of the Act of 1872, which imposes a penalty on persons found in licensed premises during prohibited hours for the purpose of being served with liquor, does not extend to cases where they are only playing cards or other games[5].

Money lent to publican for gaming cannot be recovered.

In *Foot* v. *Baker*[6] it was held that money lent a publican for the purpose of gaming in his premises contrary to his licence cannot be recovered.

Betting in a Public Place.

By 5 George IV., c. 83, section 4, any person playing or betting in any street, road, highway or other open or public place, at or with any table or instrument of gaming, at any game or pretended game of chance, shall be deemed a rogue and vagabond.

[1] 20 L. T., 483.
[2] 3 Q. B. D., 454.
[3] 29 L. J. M. C., 189.
[4] *Hare* v. *Osborne*, 34 L. T., 294.
[5] *Cooper* v. *Osborne*, 35 L. T., 347.
[6] 5 M. & G. 335.

In *Watson* v. *Martin*[1] it was held that tossing for half-pence was not within the statute. To supplement this defect in the statute, by 31 & 32 Vict., c. 52, section 3, the words "coin, card, token or other article used as an instrument or means of such wagering or gaming," are added so as to include pitch and toss. But in *Hirst* v. *Molesbury*[2] it was held that the latter statute did not apply to a deposit of money by a person in the hands of another, in a public place, to abide the event of a wager. Instruments of gaming.

In *Tollett* v. *Thomas*,[3] defendant was on a race course, and had a machine called a pari-mutuel. This machine had on it numbers, beside each of which were three holes, and behind these holes were figures which by a mechanical contrivance were made to shift on the turning of a key, so that any number from 0 to 999 would be exhibited behind these holes. On the top of the machine was the word "total," and beside it were holes in which could be exhibited in similar manner figures shifting on the turn of a key. The defendant appropriated each of these numbers to designate a horse about to run in a race. Any person who wished to bet on a particular horse, deposited with the appellant's half-a-crown, and received a ticket with the number of the horse. The defendants then by a turn of the key altered the figures, increasing the sum indicated along side that number by one, and the same turn of the key increased the figures beside "total" by one.

After the race had been run, the holders of tickets with the numbers of the winning horse had divided among them all the half-crowns deposited, less 10 per cent. which defendants retained as their profit.

Held (1) that this was an instrument of wagering or gaming within the Act. (2) That as the amount to be won depended on an event other than the issue of the race (*i.e.*, it varied according to the number of persons who backed a particular horse), it was

[1] 34 L. J. M. C., 60. [2] L. R., 6 Q. B., 130. [3] L. R., 6 Q. B., 514.

a game of chance. It was like a lottery, which (*semble* at p. 521) would be a game of chance within the Act.

It was left open whether a horse-race was a game of chance.

What is a public place?

An *omnibus*[1] is a public place at any rate for some purposes.

In *Turnbull* v. *Appleton*,[2] colliers and their families were allowed by a company to use a large field of 30 acres for recreation. Strangers were also allowed to go and play there. On one occasion defendant played pitch and toss in the field. *Held* that this field was a place to which the public had access.

It has lately been decided that *a railway carriage* is a public place while in the course of a journey.[3]

So, too, *a race course*. See *Tollett* v. *Thomas* (*ubi sup*).

36 & 37 Vict., c. 94.

The Statute 36 & 37 Vict., c. 94, repeals the Act of 1868 and provides "that any person playing or betting, by way of wagering or gaming, in any street, road, highway or other open and public place, or in any open place to which they have or are permitted to have access, at or with any table or instrument of gaming, or any coin, card, token or other article used as an instrument or means of such wagering or gaming, at any game or pretended game of chance, shall be deemed a rogue and vagabond" within the meaning of the Act of George IV., and punished under the provisions of that Act (*i.e.*, three months' imprisonment), or may be fined 40s. for a first offence and £5 for a subsequent offence.

It would seem that this statute is wide enough to take in a case like *Doggett* v. *Catterns*[4]—where it will be remembered a man had a table in Hyde Park for betting purposes.

[1] *Reg.* v. *Holmes*, 25 L. J. M. C., 121.
[2] 45 J. P., 469.
[3] *Langrish* v. *Archer*, 10 Q. B. D., 44; but see *re Freestone*, 1 H.&N., 93.
[4] 34 L. J. C. P., 159.

APPENDIX

Higginson v. *Simpson*, *ante* p. 34.—The author begs, with great respect, to suggest that this decision is erroneous, and that the case is really within the principle of *Beeston* v. *Beeston*, which, it will be remembered, decides that a partner or agent is liable to account to his co-partner or principal for winnings received on a betting transaction. The real nature of the agreement in the present case seems to have been as follows:—The defendant, accepting the plaintiff's "tip," backed the horse "Begal" at 25 to 1, laying, say £4 on him, so that if the horse won, his winnings would be £100, of which he was to account for £50 to plaintiff, while if the horse lost, plaintiff was to pay him £2, *i.e.*, share the loss in the same proportion as the profit. The author submits that this arrangement amounted to a partnership in a betting transaction, and nothing else—it was a contract to share profit and loss. Suppose plaintiff had prepaid the £2 to defendant with instructions to back the horse on their joint account, plaintiff to receive £50 as his share of the winnings, would not that have been almost on all-fours with *Beeston* v. *Beeston*? Does, then, the fact of there having been no prepayment make any difference? or the fact that here the plaintiff was to win or lose a fixed sum, instead of a certain proportion of the profits or losses? The real distinction would seem to be between an independent wager between A and B, and an agreement between A and B with respect to profits and losses to be won or incurred by a wager with a third party. The transaction in this case seems to come under the latter category; it was not like a "hedging" operation on the part of the defendant; it was not as if defendant had first made a wager with a third party backing the horse, and then made a separate wager with plaintiff betting against the horse, taking advantage, perhaps, of a change in the odds to cover his risks. The agreement clearly had reference to a betting transaction to be effected with a third party, and the plaintiff's right to the £50 was clearly conditional on the bet being made, on the horse winning, and, it would even appear, on the defendant's being paid what he won; plaintiff was to receive £50 *out of the winnings*. It was not like an unconditional, personal agreement to pay on a future event.

No doubt in form it was very like a wager between plaintiff and defendant, plaintiff backing the horse for £2 at 25 to 1 ; but the cases cited in the text seem fully to establish the principle, which was indeed accepted by the Court in the present case, that it is the substance and not the form that is material.

If the above view of the transaction be correct, the fact that plaintiff called himself a "tipster" would seem to be decidedly immaterial.

N.B.—It is necessary to call attention to a serious misprint in the "Law Reports," 2 C. P. D. 76, which would give a totally different character to the transaction. The report reads, the "*Defendant* was to pay £2 to the plaintiff." It is clear from the arguments and the judgment that it was the plaintiff who was to pay £2 to the defendant.

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